Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

—v.—

NEW YORK.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX

CRIMINAL TERM OF THE RICHMOND COUNTY
SUPREME COURT
COUNTY OF RICHMOND

THE PEOPLE OF THE STATE OF NEW YORK

against

CLIFFORD HERRING, DEFENDANT

The Grand Jury of the County of Richmond, by this indictment, accuse CLIFFORD HERRING of the crime of Attempted Robbery 1st Degree (P.L.160.15) committed as follows:

The said CLIFFORD HERRING in the Borough of Richmond, City of New York, County of Richmond and State of New York, on or about the 15th day of September, in the year of our Lord one thousand nine hundred and seventy-one, attempted to forcibly steal property from Allen Braxton, consisting of approximately Eleven ($11.00) Dollars, in good and lawful currency of the United States of America, and in the course of the commission of the crime or of immediate flight therefrom, threatened the immediate use of a dangerous instrument, to wit, a knife.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuse said defendant of the crime of ATTEMPTED ROBBERY IN THE THIRD DEGREE, (P.L.160.05) committed as follows:

The said defendant, in the County of Richmond aforesaid, on or about the 15th day of September, 1971, attempted to seal property from Allen Braxton, consisting of approximately Eleven ($11.00) Dollars, in good and lawful currency of the United States of America.

THIRD COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuse said defendant of the crime of POSSESSION OF WEAPONS AND DANGEROUS INSTRUMENTS AND APPLIANCES, (P.L.265.05) as a felony, committed as follows:

The said defendant, in the County of Richmond aforesaid, on or about the 15th day of September, 1971, had in his possession a dangerous instrument, to wit, a knife, with intent to use the same unlawfully against another, against the form of the statute in such case made and provided and against the peace of the People of the State of New York and their dignity.

All of the acts and transactions alleged in the counts of this Indictment are connected together and constitute part of a common scheme or plan.

/s/ Ralph Di Soria
Acting District Attorney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND—CRIMINAL TERM

PART II

Ind. No. 311/1971

PEOPLE OF THE STATE OF NEW YORK,

—against—

CLIFFORD HERRING, DEFENDANT.

County Courthouse
Staten Island, New York

February 3, 1972

BEFORE: HONORABLE THEODORE BARLOW
JUSTICE OF THE SUPREME COURT

APPEARANCES:

JOHN M. BRAISTED, JR., ESQ., District Attorney
APPEARING FOR THE PEOPLE

BY: ANTHONY I. GIACOBBE, ESQ., ADA,
of Counsel

SEYMOURE ADAMS, ESQ.
APPEARING FOR THE DEFENDANT

S. DAVIDSON
Official Court Reporter

[2] THE CLERK: Case on trial, Indictment Number 311 of 1971, Clifford Herring. Mr. Herring is represented by Seymoure Adams, and People are represented by Mr. Giacobbe. Are both sides ready to proceed?

MR. GIACOBBE: People are ready.

MR. ADAMS: The defendant is ready, Judge. One request, Judge. If there are any other witnesses other

than that one testifying, I respectfully request that he or she be excluded from the Courtroom.

THE COURT: Are there any other witnesses?

MR. GIACOBBE: I have none, and I make the same request of the defendant.

MR. ADAMS: We will abide. Can we approach the Bench for a moment, Judge?

(At this point, a discussion was held off the record.)

MR. GIACOBBE: Your Honor, in this case, the People will prove that on September 15th, 1971, at approximately 6:00 P.M., the complainant in this case, Allen Braxton, was at the rear of his home at 7 Markham Drive in Richmond County, New York. The People will prove that at that time the complainant, Allen Braxton, had in his hand [3] the sum of $11 in United States currency. We will prove that while the complainant was at that location with the money in his hand, he was approached by this defendant, who demanded the money from him and displayed a knife in an attempt to steal the money and rob it from the complainant's person. An exchange of words took place, the complainant left the area, ran from the area into his home, which was at 7 Markham Drive, the defendant left the area without actually getting the money, and the complainant shortly thereafter reported the incident to a police officer. And we will prove further that at approximately 7:30 to 8:00 P.M. that evening, the defendant was placed under arrest in connection with this case.

THE COURT: Defendant wish to make a statement?

MR. ADAMS: Just briefly, Judge. The defendant has informed me that he did not commit this particular crime, that he was not at the location, he was not in the area at the time of the alleged commission of this crime, and that we hope to prove that to the satisfaction of the Court. I have already told Mr. Giacobbe that it will be alleged that the defendant was not at the location when the alleged crime took place.

[4] THE COURT: All right, call your witness.

MR. GIACOBBE: We call Allen Braxton, please.

ALLEN BRAXTON, 7 Markham Drive, Staten Island, New York, having been first duly sworn. testified as follows:

DIRECT EXAMINATION

BY MR. GIACOBBE:

Q What is your occupation?
A I'm a Marine.
Q When were you sworn into the United States Marine Corps?
A Yesterday.
Q Mr. Braxton, on September 15th, 1971, where were you living?
A 7 Markham Drive.
Q On Staten Island?
A Yes.
Q And on September 15th, 1971, at approximately 6:00 P.M., where were you?
A 7 Markham Drive in the back.
Q Were you inside or outside?
A Outside.
MR. ADAMS: Will you ask the witness to please speak louder, Judge.
[5] THE COURT: Speak up so Mr. Adams can hear you.

CONTINUING DIRECT EXAMINATION

BY MR. GIACOBBE:

Q You were outside in the back, is that correct?
A Yes.
Q What were you doing on that day at that time and place?
A Just walking.
Q Where had you been?
A I don't remember exactly where I was coming from.
Q Now, while you were there, what, if anything, did you have in your hand?
A I had money.
Q How much money did you have in your hand?

A $11.
Q What were you doing with the money that you had?
A Putting it in my pocket.
Q As you were doing that, were you alone?
A No.
Q What happened? Who were you with?
A No, I am talking about when—
Q You say—
A Me and someone else.
Q I will rephrase the question. You say you were [6] in the back of 7 Markham Drive, is that correct?
A Yes.
Q You had money in your hand, is that correct?
A Yes.
Q What, if anything, happened at that time and place?
A Well, Clifford Herring had walked up to me and said that he was sick and that he needed some money, and I said no. So he took out a knife and he tried to cut me. So, I had just ran into my house.
MR. ADAMS: Sorry, I didn't hear that, Judge.
THE COURT: Read back the witness' answer.

(The above answer was read back.)

CONTINUING DIRECT EXAMINATION

BY MR. GIACOBBE:

Q When Clifford Herring took out the knife and tried to cut you, will you describe to the Court just what he did with that knife.
A Made a motion. (Indicating.)
Q Indicating a motion of the right hand, the right arm being extended and the right wrist being flicked. Did he say anything to you when he did that?
A Just what I said before.
Q And then you ran into the house after, is that [7] correct?
A Yes.
Q Before September 15th, 1971, had you ever seen Clifford Herring?

A Yes.

Q And when you say Clifford Herring, will you look in this Courtroom and see if the person you are talking about is present now.

A Yes.

Q Will you please point him out. (Indicating the defendant, Clifford Herring.)

Did you know the defendant Clifford Herring before September 15th, 1971?

A Yes.

Q And for how long a period of time did you know him?

A Six months.

Q When you say you know him, will you explain to the Court in what way you knew him, whether you were friends or socialized together or what.

A I just knew about him, I heard about him, people were telling me—

Q Don't tell us what people told you about him. Had you ever seen him?

[8] A Yes.

Q Did you know what his name was?

A Yes.

Q Now, when you ran into the house, what, if anything, did the defendant, Clifford Herring do?

A I don't know, I didn't turn around.

Q What did you do when you went into the house?

A I was looking for the cop that was in my house at the time, it's Patrolman Medis.

Q Do you know a Patrolman Wilfred Stubbs?

A Yeah, I just made a mistake there, I'm sorry.

Q What's that?

A Stubbs is the name I meant.

Q When you say Patrolman Medis, you mean you meant Patrolman Stubbs, is that correct?

A Yes.

Q On September 15th, 1971, before the time that Clifford Herring came up to you around 6:00 P.M., had you seen Patrolman Stubbs?

A Yes.

Q And where had you seen him?

A I seen him in my house.
Q About what time was it when you saw him?
A About 5:30.
[9] Q Do you know how long Patrolman Stubbs had stayed inside your house?
A No.
Q Do you know when he left your house?
A No, I don't.
Q When you went into the house after the defendant Herring flicked a knife at you, was Stubbs in the house then?
A No.
Q Who was in the house when you went in?
A Just my mother.
Q Now, what did you do after you went into the house?
A I asked my mother where did—
MR. ADAMS: Judge, I object to this as not binding upon the defendant what he said to his mother, what he did when he went into the house, Judge.
THE COURT: I will sustain the objection.

CONTINUING DIRECT EXAMINATION

BY MR. GIACOBBE:

Q When you went in the house, did you speak to your mother?
A Yes.
[10] Q After speaking to your mother, did there come a time when you spoke to Patrolman Stubbs that night?
A Yes.
Q And did you talk to Patrolman Stubbs when you saw him?
A Yes.
Q Now, you testified that you saw the defendant Herring at the rear of your house at around 6:00 P.M., is that correct?
A Yes.
Q Did you see the defendant Herring at any other time after that on the night of September 15th, 1971?

A Yes.
Q At approximately what time was that?
A It was before eight o'clock.
Q Do you recall whether it was between—I withdraw that.
Where was the defendant Herring when you saw him then?
A On Broadway and between Castleton and Henderson Avenue.
Q Was anyone with him when you saw him?
A No.
Q Was anyone with you when you saw him?
A Yes.
[11] Q Who was with you?
A Willie Stubbs.
Q When you say Willie Stubbs, are you referring to Patrolman Stubbs?
A Yes.
Q Is he a Housing Authority police officer at that time?
A Yes.
Q Now, when you were with Patrolman Stubbs and you saw the defendant Herring, what did the police officer do?
A He went over and made an arrest.
Q Now, going back to the six o'clock time that you testified about, did the defendant Herring take the money from you that you had in your hand?
A No.
Q Did you keep the money when you ran into the house?
A Yes.
MR. GIACOBBE: Thank you very much, your witness.

CROSS-EXAMINATION

BY MR. ADAMS:

Q 7 Markham Drive, is that part of the Housing
[12] Authority development?

A Yes.
Q And 7 Markham Drive, between what two streets is it?
A Wayne Court and Wayne Terrace.
Q Now, you say you were in your back yard about 7:00 P.M. on—
A Six.
Q 6:00 P.M., I'm sorry. On September 15th, is that correct?
A Yes.
Q You said you had some money in your hands?
A Yes.
Q Now, where had you just come from?
A I was walking from a park that's behind my house.
Q What park?
A The Markham Homes.
Q And you were walking to your house?
A Yes.
Q Did you have the money in your hands at that time?
A Yes.
Q How was that money broken up, the $11?
A $11.
Q How much money did you have?
[13] A $11.
Q How was it broken up?
A Ten and one.
Q Was it silver dollars, bills or what?
A Bills.
Q What kind of bills?
A A ten and a one.
Q And where had you gotten that $11?
A Well, I had a job at the time.
Q Where were you working?
A Alfredo's Smelting Company.
Q What?
A It's a steel company.
Q What time had you finished working that day?
A Five o'clock.
Q From your place of employment where did you go that night after you left?

A I came home.
Q You came home. How long did you stay at home?
A Well, I didn't go into the house.
Q You just went to the house, but you didn't go in, is that correct?
A I went to the area of where I lived at.
Q All right. What part of the area did you go to [14] after you left work?
A Well, I was up on North Burgher.
Q And did you walk—
A Yes.
Q —from your place of employment to North Burgher?
A Yes.
Q From North Burgher where did you go?
A I don't remember right there, but it was in the vicinity of my house.
Q In the vicinity of your house?
A Yes.
Q Did you ever enter into your house from the time that you left your employment at five o'clock until 6:00 P.M. on September 15th?
A Yes.
Q When did you enter your house?
A I would say about 5:30.
Q How long were you in the house?
A About five or ten minutes.
Q I see. And did you eat?
A No.
Q And you said you saw Patrolman Stubbs in the house?
A Yes.
[15] Q Is he a friend of yours?
A Yes.
Q Is he a friend of your mother and father?
A Yes.
Q And, yes or no, did you speak to Officer Stubbs on or about 5:30 P.M. at all?
A I said hi.
Q And then you went out?
A Yes.

Q And where did you go?

A I went out the front and I walked back up to North Burgher to see if a friend of mine—car was there.

Q When you walked out of your house at approximately 5:35 P.M., and you went up the street to see a friend of yours, did you have the money in your hands?

A No.

Q And what were you wearing at that particular time?

A Shirt, dungarees and shoes.

Q Did you have pants on?

A Excuse me.

Q Did you have any slacks on or pants?

A Yes.

Q Those slacks or pants have any pockets?

A Yes.

[16] Q And what did you have in those pockets when you left the house on or about 5:35 P.M.?

A I had a wallet.

Q You had a wallet?

A Yes.

Q Was your wallet in your pockets?

A Yes.

Q Was that $11 in the wallet when you left your house at about 5:35 P.M.?

A No.

Q What day of the week was September 15th?

A I don't recall.

Q What was the weather at 5:35 P.M.?

A It was nice out.

Q Do you know the temperature?

A No, I don't.

Q Approximately?

A No.

Q Warm day or cool day?

A Warm.

Q Were you wearing a hat?

A No, I wasn't.

Q What did you have in that wallet as you left at or about 5:35 P.M. from your house? What did you have [17] in that wallet?

A Nothing.

Q Nothing at all?

A No.

Q It was an empty wallet?

A Yes.

Q Devoid of any papers or anything else, is that correct?

I will withdraw the question.

You didn't have any papers at all in that wallet?

A Yes, I had papers in the wallet.

Q But no money?

A No money.

Q Did you have any silver with you?

A No, I didn't.

Q And you left to see a friend, is that correct?

A Yes.

Q And how far did you walk? Approximately?

A I can't say.

Q What's that, sir?

A I don't remember. I don't know the distance of how far I walked.

Q From 7 Markham Drive where did you go to? What address?

[18] A It wasn't an address, I was just looking out in the street.

Q Just looking up the street?

A Yes.

Q Didn't you walk up the street?

A Yes.

Q You weren't in a car, were you?

A No.

Q And how far did you walk, a block, two, ten or fifteen?

A About a block.

Q And when you walked that block, did you see someone?

A No.

Q You saw no one?

A No.
Q And then you returned?
A Yes.
Q On your way back, did you speak to anyone?
A No, I didn't.
Q And on your way back did you go into the house?
A This was after I had left the house at 5:30, right.
Q 5:35 you said you walked up the street, is that correct?
[19] A Yes.
Q And you went to see someone? You didn't see that party, is that correct?
A Yes.
Q And then you decided to walk back, is that correct?
A Yes.
Q And was the sun out?
A Yes.
Q And did you walk down the same block that you walked up?
A No.
Q Which block did you walk back on?
A The back of my house.
Q Is that a street or is that a back yard?
A It's a street.
Q What is the name of that street?
A Markham Court.
Q And you walked down Markham Court to the rear of your house?
A Yes.
Q And then all of a sudden you said Mr. Herring appeared, is that correct?
A Yes.
[20] Q Now, where did you get the $11?
A From work.
Q From work?
A Yes.
Q But didn't you just tell me that you left the house at or about 5:35 P.M., you had no money with you?
A You said if I had any money in my wallet.
Q Right.

A I had the money in my front pocket.
Q In your front pocket. You didn't have it in you wallet?
A No.
Q And you walked back and went to the back of your house, is that correct?
A Yes.
Q Did you take out the money from your pocket?
A I was taking my money out of my pocket and putting it in my wallet.
Q And was taking the money out of your pocket and putting it in the wallet.
A Yes.
Q Was there any reason why you decided to take the money out of your pocket and put it in your wallet?
A I didn't want to lose it.
[21] Q You weren't afraid of losing it before, were you?
A Excuse me.
Q You weren't afraid of losing this money before, were you?
A No.
Q Now, how long were you standing in the back of your house before allegedly Herring came along?
A A few minutes.
Q A few minutes. Now, when you came back to the house, did you immediately start to put the money from your pocket into your wallet?
A Yes, I had it like this here at first, I counted it, then I put it in my wallet, was going to put it in my wallet.
Q Then you put it in your wallet?
A No.
Q How long were you in the back of your house before Mr. Herring came along?
A Just a few minutes.
Q Approximately? Only a few minutes, it could mean two, it could mean seven to me anyway.
A About three minutes.
Q Was there anyone else in the area?
[22] A No.

Q Now, how long did it take you to take the wallet out of your pocket?
A Less than a minute.
Q And which pocket was that wallet in?
A My rear pocket on the left-hand side.
Q Which pocket was the money in?
A My front pocket.
Q Now, how long did it take you to take the money out of your front pocket?
A Less than a minute.
Q All right. Less than a minute. In that minute you were taking it out and putting it in the wallet, you hadn't yet put it in the wallet, is that your claim?
A Right.
Q What is the name of your father?
A Allen Braxton.
Q Is that senior?
A Excuse me.
Q Is that Allen Braxton Senior?
A Yes.
Q In other words, he has the same name as you have?
A Yes.
Q Did you at any time live next door to Herring?
[23] A To Herring?
Q Yes.
A No.
Q You were never a neighbor of his?
A No.
Q Now, did you see Herring approach you?
A Yes.
Q How far away was he from you when you first saw him?
A I don't know exactly.
Q Well, judge it by distances in this room, if I may suggest it, when you first saw Herring at or about 6:00 P.M. on September 15th. Could you tell us by looking about here in this room approximately how far he was from you?
A About from here to the table.

Q This table over here?
A Yes.
Q Did he say hello to you?
A No.
Q He said nothing. And at that time what were you doing when you first saw him?
A I was just getting ready to put my money in my wallet.
Q Were you looking down at your wallet or were you [24]looking at Herring?
A I was looking at my wallet.
Q I see. Now, when you first saw Herring, did he have a knife on him?
A I didn't see it at the time.
Q You didn't see the knife?
A No.
Q And then he approached you, is that correct?
A Yes.
Q Did he touch you at all?
A No.
Q He did not?
A No.
Q Please speak a little louder.
A No.
Q He just walked up to you, is that correct?
A Yes.
Q And allegedly he said to you I am ill, is that correct?
A Yes.
Q Did he say what was wrong with him?
A No.
Q Did he look ill to you?
A No.
[25] Q What?
A No.
Q Now, how tall are you, Mr. Complainant?
A Five Eleven.
Q How tall is Herring?
A I don't know.
Q Is he taller than you?
A Yes.

Q What was he wearing?
A A suit.
Q He was wearing a suit?
A Yes.
Q Do you remember the color of the suit?
A No.
Q Tie and shirt?
A Yeah, he had a shirt on, I don't know if he had a tie.
Q And how close did he come to you at any time?
A From here to the small table right here.
Q From here to about the small table, would you say that was approximately four feet or so?
A Yes.
Q And what did he say to you? Will you please give us the exact words that Mr. Herring said to you as he stood in front of you approximately four feet from you?
[26] A He said, "Please give me some money, I am sick."
Q I see. And at that particular time did he have a knife in his hand?
A No.
Q What did you say to him about giving him the money?
A I told him no, I wasn't giving it to him.
Q All right. And, at that time when you told him you weren't giving him the money, was the money then in your wallet?
A No.
Q Where was it?
A It was still in my hand.
Q Now, how long was that money in your hand prior to the time Mr. Herring approached you?
A Until I ran in the house.
Q Now, when you said to him that you weren't going to give him the money, what do you allege he then did?
A What did Herring do?
Q Yes.
A Well, he took his hand out of his pocket and he had a knife, and he swung at me with it.

Q I see. He didn't hit you, did he?
A No.
[27] Q Can you describe to us the knife?
A It was about four inches long.
Q Color?
A Color of what?
Q Of the knife or the handle, whichever you might see.
A The blade was silver.
Q And the handle?
A I didn't see the handle.
Q Which hand did he have the knife in?
A It was his right hand.
Q Did he swing at you with his right hand?
A Yes.
Q Was the knife in that right hand?
A Yes.
Q When he swung at you, was he still approximately four feet away from you?
A No, he had moved up a step.
Q I see. Did he touch you with his hands at all?
A No.
Q Did you scream?
A No, I didn't.
Q Did you just turn around and go into the house?
A Yes.
[28] Q One more, please, Judge. Now, when you went in the house, Mr. Braxton, did you call the police?
A Call them on the phone?
Q Yes.
A No.
Q Did you have a phone?
A Yes.
Q Did you call the police?
A No.
Q Where did you go?
A I went to—
Q You went into the house, and tell us please what you did.

A I asked my mother where—

Q No, you cannot tell us what you said to your mother, tell us what you did.

A I walked out the front door looking—

Q You went in the back door, is that correct?

A Yes.

Q And you ran out the front door?

A Yes.

Q How much later did you run out the front door?

A As soon as I found out the officer wasn't in my house.

[29] Q You ran out the front door?

A Yes.

Q And where did you run to?

A To where the officer was.

Q And where was the officer?

A North Burgher.

Q How far is that? Roughly?

A I would say about double the length of this Courtroom. Where he was on North Burgher, where the officer was on North Burgher was the length of this Courtroom.

Q And now, this fellow Stubbs was a Housing Authority police officer, is that correct?

A Yes.

Q But you did not call the regular police department, is that correct?

A No.

Q Now, there is another officer by the name of Mineros (phonetic spelling), do you know him?

A No, I don't.

Q Wasn't there another officer with Stubbs that you saw after you went to the Housing Authority office?

A Yes.

Q What was the other officer's name?

A I don't remember his name.

[30] Q Will you describe him to us?

A He's about five six, on the heavy side.

Q On the heavy side. White or black?

A White.

Q Now, how long did you stay in your house after you ran into the house after leaving Herring and going out the front door, how long approximately were you in your house?

A It was less than a minute.

Q Did you leave off your money in the house?

A No.

Q You left your money?

A In my pocket.

Q Now, when you ran in the back door, didn't you have your money still in your hand?

A Yes.

Q When did you put the money in your pocket?

A When I got in the house.

Q And you stayed there approximately a minute?

A Yes.

Q And you ran out the front door?

A Yes.

Q Weren't you afraid Herring would come after you with the knife?

[31] MR. GIACOBBE: Objection, Your Honor.

THE COURT: Overruled, I will take it, you may answer.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Did you know where Herring had run to after you had run into the house?

A No.

MR. GIACOBBE: Judge, can we have the witness answer the other question first, he has been asked two questions.

THE COURT: They are two sepaarte questions.

MR. ADAMS: I didn't hear any answer, so I withdrew my question and went on to another.

THE COURT: Proceed.

MR. ADAMS: However, I will abide by anything the Court says, whatever the Court wants me to do. I didn't hear any answer.

THE COURT: Just go ahead with your examination.
MR. ADAMS: Fine, sir.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Now, did you run up to the Housing Authority office [32] or did you walk up?
A No, I had ran to somebody's house.
Q On the way?
A Yes, before I got to there.
Q Whose house did you run into?
A I don't know the name of the people.
Q But you ran into the house?
A I didn't run in, I ran to the house.
Q You ran to the house?
A Yes.
Q What did you do at that time at that house? Did you enter the house?
A No.
Q When you say you ran to the house, what did you do, run to the front door?
A Yes.
Q Then you ran away?
A No.
Q What did you do then?
A I knocked on the door.
Q Was there anyone home?
A Yes.
Q Who was home?
A I don't know the people.
[33] Q Who answered the door?
A A man.
Q Do you know the name of the man?
A No.
Q Were you looking for someone?
A Yes.
Q Who were you looking for?
A Stubbs.
Q I see. Did Stubbs live there?

A No.
Q How did you know he would be there?
A Because my uncle had told me that he was there.
Q Who had told you?
A My uncle.
Q Where did you see your uncle?
A In his house.
Q Where?
A In his house.
Q Where?
A By his house.
Q Now, you just told us that you ran from your house and you ran up to this party's house where you knocked on the door. Did you go to your uncle's house first?
A My uncle lives next door to this guy.
[34] Q Did you go there first?
A To my uncle's house? No.
Q How did your uncle tell you that Stubbs may be in this house that you were knocking on the door?
A Well, as I was on my way there, I asked him, did he see Willie Stubbs, and he said yeah.
Q You met your uncle on the way there?
A Yes.
Q And you asked him whether he saw Willie Stubbs, is that correct?
A Yes.
Q And I assume he told you he is in this house?
A Yes.
Q And you went to this house?
A Yes.
Q And you asked the party who answered whether Willie Stubbs was in the house?
A Yes.
Q What did this party say, yes or no?
A He said yes.
Q They said yes?
A Yes.
Q And Willie Stubbs came to the door?
A Yes.
[35] Q Did you ever get to the office then?

A To the office?
Q Yes, of the Housing Authority on North Burgher Avenue, you said you were running to.
A Yes.
Q Did you ever get there?
A To North Burgher?
Q Yes.
A Yeah.
Q How did you get there?
A I ran.
Q Now, maybe I am missing something here, let's go over this thing again, if I may.
When you left your house, you say you ran towards this individual's house, is that correct?
A Yes.
Q On the way you met your uncle?
A Yes.
Q What is your uncle's name?
A Herman Braxton.
Q Herman Braxton?
A Yes.
Q And you allegedly asked him whether he saw Officer Stubbs, is that correct?
[36] A Yes.
Q And he said he is probably in there, is that correct?
A Yes.
Q So you went and knocked at that door?
A Yes.
Q And Officer Stubbs was there, is that correct?
A Yes.
Q And allegedly you told Officer Stubbs what happened, is that correct?
A Yes.
Q Now, what was the address of this house where Officer Stubbs was?
A I don't remember the address.
Q How far was it from your house?
A About twice the length of this Courtroom.
Q And then where did you go with Officer Stubbs?
A Looking for Herring.

Q Looking for Herring. Did Officer Stubbs in your presence call the police department?
A Yes, he did.
Q You heard him?
A Yes.
Q Did any policemen come?
[37] A Yes.
Q What precinct did they come from?
A 120.
Q And did they come to this house where Officer Stubbs, where you saw Officer Stubbs?
A No.
Q Where did they come to?
A They had gone to the other projects up the street.
Q Did you see them come there?
A Yes.
Q Did you go with Officer Stubbs over to this office?
A Yes.
Q And how long did you remain in this house where you found officer Stubbs?
A I wasn't in the house.
Q You were just outside?
A Yes.
Q And did he come immediately with you?
A Yes.
Q And where you go to?
A We were walking up to the office.
Q You and Officer Stubbs?
A Yes.
[38] Q You were walking with him up to the office, is that correct?
A Yes.
Q Did you reach the office?
A We reached the office, we saw Clifford before we reached the office.
Q You saw Clifford before you reached the office?
A Yes.
Q What time is this? Let's go back over this thing then.

At or about 6:00 P.M. Clifford Herring approached you in the rear of the house, is that correct?

A Yes.

Q How long did he stay in and about your vicinity where you were?

A How long did Clifford stay there?

Q Yes.

MR. GIACOBBE: I will object, it's repetitious, it's been asked and answered.

THE COURT: It's cross-examination.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Yes.

A Excuse me.

[39] Q How long after Herring approached you and asked you for the $11 because he is sick, how much later did you run in the house?

A Right after it.

Q Approximately how long did it take, a minute, two minutes, half a minute, approximately?

A About a half a minute.

Q Then you ran into the house, is that correct?

A Yes.

Q You stated to me that you stayed in the house approximately one minute, is that correct, and then you ran up the street?

A No, I ran to the house where Stubbs was.

Q On the way to the house where Stubbs was, you met your uncle, is that correct?

A Yes.

Q How long were you with your uncle?

A About a minute.

Q And then you went to the door, is that correct? How long did it take to get from your uncle to this door which you knocked?

A About a half a minute.

Q And how long were you at this particular door after you knocked at the door?

[40] A It was over five minutes. Seven minutes.
Q About seven minutes?
A Yes.
Q And Officer Stubbs went with you?
A Right.
Q And you went looking for Herring, is that correct?
A Yes.
Q And how much later did you find Herring?
A About a half-hour.
Q So we have this, you found Herring at or about quarter to seven, am I correct in that?
A Around that time.
Q Around a quarter to seven you found Herring, and what was Herring doing at that time?
A Walking down the street.
Q Walking down the street. And it was at this time that you told Stubbs there is Herring, is that correct?
A Yes.
Q Did Stubbs know Herring?
A Yes.
Q And Herring is walking down the street, and the officer took him with him, is that correct?
[41] A Yes.
Q Did he take him in his car?
A No.
Q Did he walk him?
A Yes.
Q Did you go away at that time?
A No, I didn't.
Q You stayed?
A Yes.
Q Did you stay with Officer Stubbs when he arrested Herring?
A Yes.
Q You did. And were you present with Stubbs when he approached Herring?
A Yes.
Q And how long did the officer talk to Herring?
A I don't know how long he was talking to Herring.
Q Were you present all that time?
A Yes.

Q Did the officer search him?
A Yes, they searched him.
Q Did they find that knife you had said that Herring had threatened you with?
A Well, he had found the blade, I guess it was brokened [42] off the knife, I don't know.
Q Was that blade attached to anything?
A No.
Q It was not?
A No.
Q And did the officer, did Stubbs take Herring with him?
A Yes.
Q Did you go along?
A Yes.
Q Now, tell me, where did the officer take Herring?
A To the West Brighton Plaza Police Office.
Q Is that the Housing Authority Police Office?
A Yes.
Q How far is that from where you found Herring?
A About a half a block.
Q I see. And all three of you walked, is that correct?
A There was four of ous.
Q Who was the fourth one?
A The other patrolman.
Q The other patrolman, was that also a Housing Authority patrolman?
A Yes.
[43] Q And where did he come into the picture?
A He was there, he was out walking the beat, I guess, and met Medis, had told us what had happened?
Q Who told him what happened?
A Stubbs.
Q And the other officer approached also?
A Yes.
Q Did they put any handcuffs on Herring?
A Yes.
Q They did. And he walked handcuffed down the street to the office, is that correct?
A Yes.
Q Did you walk along with him?

A Yes.
Q Did you go into the office with him?
A Yes.
Q And were they any time alone with Herring when you weren't there?
A Yes.
Q And any time thereafter did the police come?
A Yes.
Q Now, when did Stubbs call the police?
A When he got in the office.
Q Did you—were you in the office at that time?
[44] A Yes.
Q And how soon after did the police come? Approximately?
A About fifteen minutes.
Q All this time, was Herring in handcuffs?
A No, he wasn't.
Q He was not?
A No.
Q They took the handcuffs off him when he came to the office?
A They didn't have handcuffs on him when they were carrying him in.
Q What?
A They didn't have handcuffs on him when they were taking him in.
Q Didn't you say they put handcuffs on him in the street?
A I made a mistake then.
Q They didn't handcuff him?
A No.
Q And did Herring go with them voluntarily?
A After awhile.
Q After awhile. Now, at the office of the Housing Authority, did you sign any papers?
[45] A No.
Q And did you go down to the precinct that night?
A Yes.
Q What time did you arrive at the precinct?
A I don't know the time I arrived there.
Q How did you get down to the precinct?

A Stubbs rode me down—no, the other officer gave me a ride down.

Q The other officer. Did Stubbs also go down to the police precinct?

A Yes.

Q Did you see the other officer and Stubbs at the police precinct?

A Yes.

Q And you stayed at the precinct how long?

A About an hour and a half.

Q Did you sign any papers at the police precinct?

A I don't remember.

Q And at any time did you hear Herring say that he was working at the time?

MR. GIACOBBE: Objection, Your Honor, it's hearsay.

THE COURT: I will take it, overruled.

CONTINUING CROSS-EXAMINATION

[46] BY MR. ADAMS:

Q At any time did you hear Herring say that he was working at the time that allegedly you claim that he waived a knife at you?

A Yeah, he said that.

Q He said he was working, is that correct?

A Yes.

Q Who did he say he was working for?

A He didn't say.

Q In other words, he said he was innocent, is that correct?

A Yes.

Q And he said he was working at that time, is that correct?

A Yes.

Q And the police officers in your presence called up someone to check on this story, yes or no?

A I don't know, because after awhile I was taken out of the room.

Q After awhile you were taken out of the room?

A Yes.

Q Now, did you go down to Court the following day?
A Yes, I did.
[47] Q While I'm at it, Mr. Giacobbe, would you extend the courtesy of turning over the Grand Jury minutes of this particular witness with the permission of the Court, please. I will make that request through the Court.
MR. GIACOBBE: I am now handing to Mr. Adams the transcript of this witness' Grand Jury testimony consisting of pages 2 through 9, taken on November 8, 1971.
MR. ADAMS: Judge, may I have a moment?
THE COURT: All right.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Page 4, Mr. Braxton, you remember being asked this question by Mr. Braisted and giving this answer?
"Question: When he swung at you, did he touch you? Answer: No, and then after that I ran into my house, and I thought the cop was still there, and he wasn't there, and I had to run up the street to get him. I had caught Clifford up on Castleton and Broadway."
Now, did you tell this to us on cross-examination here that you and the officer saw Herring on Broadway?
A Yes.
Q Which is correct, what you gave before the Grand Jury, you said, "I had caught Clifford up on Castleton and [48] "Broadway," or you and the police officer?
A It was me and the police officer.
Q Now, officer—I mean, Mr. Braxton. You said you knocked on the house up the street from where you lived, and finally Officer Stubbs came to the door, is that correct? And then you told us that he came out and walked with you, is that correct?
A Yes.
Q And while walking with you, you saw Herring, is that correct?
A Yeah, after awhile.

Q How long were you walking?
A About a half an hour.
Q You were walking, just walking around the place looking for Herring?
A Yes.
Q At any time did you get to the police office or the Housing Authority office?
A After the officer had made the arrest.
Q Not before?
A No.
Q You remember being asked this question and giving this answer before the Grand Jury, and these questions were posed to you by Mr. Braisted, page 5.
[49] "Question: What did Patrolman Stubbs do after you told the officer what had happened? Answer: He came out of the house that he was in and ran down to the office and phoned up to the other officers about Clifford Herring."
Now, which did he do? Did he go to the office first or did he go walking around looking for Clifford Herring?
A He had went down to the office, but it wasn't the police office.
Q I asked you before whether he went to the Housing Authority office, and you said no.
A This wasn't the Housing Authority office that he made the phone call at.
Q What was it?
A It was just a regular office building.
Q Mr. Braxton, after you ran away from Clifford Herring from the back of the house, you ran into your house, is that correct?
A Yes.
Q Did you ever look out to see what happened to Herring?
A No.
Q Never looked out?
A No.
[50] Q Was there anyone else in the house then when you ran in besides your mother?
A Yes, my sister.

Q How old is she?

A She is twenty.

Q Now, at any time in that particular one minute that you say you were in the house, at any time did you look back or out to see where Herring had gone?

A No.

Q On page 7, line 4, do you remember being asked this question and giving this answer?

"Question: Mr. Braxton, where did he go and what did he do? Answer: Standing there for awhile, and I didn't hear what he said. I ran into my house. He didn't know I lived here, and I looked back out there, and he was gone."

Now, which is correct, the testimony you are giving here or the testimony you gave before the Grand Jury?

A The testimony I gave here.

Q You never did look out?

A No.

Q So the testimony you gave before the Grand Jury is [51] incorrect, is that correct?

A Yes.

MR. GIACOBBE: I am going to object, the testimony speaks for itself, it didn't say he looked out the window, it says he looked back, it didn't say from what point or where.

MR. ADAMS: "And I looked back out there, and he was gone."

THE COURT: I heard it. Go ahead.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Now, Mr. Braxton, you remember being asked these questions and giving these answers before the Grand Jury? Page 8, starting at the top.

"Question: Could you describe to the gentlemen of the Grand Jury what it was that Clifford Herring had in his hand when he swung at you? Answer: Well, I seen him go like this. Mr. Braisted: Indicating a flick

of the wrist. Answer: Yes. And all I saw was something that looked like a blade."

Now, didn't you before tell us that this blade was approximately six inches long, had a shiny handle?

A Six inches long, no.

Q Now, was this a blade or was this a knife?

[52] A Blade. I seen the blade.

Q Then you didn't see a knife then?

A I didn't see the hand'e, I seen the blade.

Q How big was this blade?

A Around four or five inches.

Q Was it shiny?

A No. No.

Q What's that?

A I said no.

Q It was not shiny. Do you remember being asked this question and giving this answer about the description of the knife to the Grand Jury in response to questions by Mr. Braisted? Page 8, line 17, "Mr. Braxton," —"Question: Was it shiny? Answer: I don't remember if it was shiny or not."

Now, which was it, shiny or not, was it correct what you said before the Grand Jury or was it correct what you said here in Court?

A It's correct what I said here.

Q Correct what you said here today?

A Yes.

Q And what you said before the Grand Jury was incorrect, is that correct?

A Yes.

[53] Q What?

A I said yes.

Q Now, could you, if the Court would permit, stand up and show us exactly the motion that Mr. Herring made at you in the rear of your house at or about 6:00 P.M. on September 15th, 1971. May the witness do that, sir?

THE COURT: He may. You may stand up and show us what Mr. Herring did.

THE WITNESS: He went like this here.

THE COURT: Did he take a step forward towards you?

THE WITNESS: Yes.

THE COURT: He swung with his right hand with the blade sticking out, the top part of his hand or the bottom part of his fist?

THE WITNESS: The top.

THE COURT: Did you step back as he swung?

THE WITNESS: Yes.

THE COURT: Had you not stepped back, would he have hit you with the blade?

THE WITNESS: Yes, he would have.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Braxton, do you remember being asked this [54] question and giving this answer before the Grand Jury?

"Question: Could you describe to the gentlemen of the Grand Jury what it was that Clifford Herring had in his hand when he swung at you? Answer: Well, I seen him go like this. Mr. Braisted: Indicating a flick of the wrist. Answer: Yes. And all I saw was something that looked like a blade."

Is that correct?

A Yes.

Q Now, when Herring was speaking to you in the back of the house, did he yell at you or speak softly or what?

A He was speaking soft.

Q He was speaking softly?

A Yes.

Q Was he wearing colored glasses?

A No.

Q No?

A No.

Q He never raised his voice, is that correct?

A No, he didn't raise his voice.

Q He did not raise his voice?

A No.

Q Do you remember being asked this question by Mr. Braisted and giving this answer on page 9?

[55] "Was Clifford Herring speaking in a loud voice or low voice? Answer: It was kind of loud."

Do you remember giving that testimony before the Grand Jury?

A No.

Q You don't remember it?

A No.

MR. ADAMS: Would the District Attorney, the prosecutor of this case, would he admit that this was the question and this was the answer that was taken down by the District Attorney's stenographer?

MR. GIACOBBE: Judge, I will stipulate—I have no objection to counsel offering these entire nine pages into Evidence, if he so desires.

MR. ADAMS: Fine, Judge, you can see for yourself the way these things read. Can we have the original, Mr. Giacobbe?

MR. GIACOBBE: That is the original.

THE COURT: Mark it as Defendant's Exhibit A.

(Defendant's Exhibit A was received and so marked into evidence. Grand Jury minutes of Allen Braxton.)

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

[56] Q Mr. Braxton, do you know a Mrs. Taylor who lived at 9 Markham Drive?

A No.

Q No?

A No.

Q Did you ever live near number 9 Markham Drive?

A I live at 7.

Q Is that next door, is that correct?

A Yes.

Q Did a Mrs. Taylor live there?

A No.

Q How long have you lived there?
A About nine years.
Q Did you ever see Herring live there in the last nine years?
A No.
Q Do you know whether your father and Clifford Herring were ever in the Army together?
A Yes.
Q Were they?
A From what I hear.
Q They were, is that correct?
A Yes.
Q Mr. Braxton, have you ever been arrested?
[57] MR. GIACOBBE: Objection, Your Honor.
THE COURT: Objection sustained.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Braxton, have you ever been convicted of a crime?
A No.
Q Do you know Leon Tucker?
A Yes.
Q Do you know George McCombs?
A Yes.
Q Did you ever commit a crime with those two men?
A Yes.
MR. GIACOBBE: Objection, Your Honor, to the form of the question.
THE COURT: Objection sustained.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Were you ever arrested with George McCombs and Leon Tucker?
MR. GIACOBBE: Objection, Your Honor.
THE COURT: Objection sustained.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

[58] Q Were you ever arraigned in this Court?
MR. GIACOBBE: Objection, Your Honor.
THE COURT: Objection sustained.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Now, Mr. Braxton, how many times did Herring swing at you?
A He made one swing when I was standing at him.
Q Then you stepped back, is that correct?
A Yes.
Q Then did you run in the house?
A Yes, but—
Q Sorry, I don't want to—
A —I seen him making a motion to get ready to make another swing, but I was gone.
Q So actually he swung at you once, is that correct?
A Yes.
Q And that was with something that looked like a blade, is that correct?
A Yes.
Q Now, do you remember being in the Criminal Court on September 16th, 1971, which is the day after the commission of this alleged crime?
[59] A Yes.
Q And do you remember, Mr. Braxton, stating in the complaint in the Criminal Court that Mr. Herring swung at you several times with the knife? A couple of times with the knife, is that correct?
A Well, the second time I was making—when he made the half move.
Q But he didn't swing at you the second time, is that correct?
A No.
Q What does a couple of times mean to you?
A Two.

Q Two. Could it mean three? And actually it wasn't a knife, it was a blade, is that correct?

MR. GIACOBBE: Objection to the double question that included counsel arguing with the witness on the second question.

MR. ADAMS: I will withdraw if the Court thinks that's improper.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Now, did he swing at you once, twice or three times?

A He swung at me once.

[60] Q And was it with a knife or with something that looked like a blade?

A Something that looked like a blade.

MR. ADAMS: I ask the Court at this time to take into consideration for the purpose of saving time, a copy of the felony complaint in the Criminal Court, which I believe to be in the possession of this Court, and would like to offer that in Evidence to show inconsistencies with the testimony given here before this Court. And for that purpose and that purpose only, I would like to offer that into Evidence.

THE COURT: The Court will take into consideration whatever is in the file of this Court.

MR. GIACOBBE: No objection, Your Honor, to the Court examining the complaint.

MR. ADAMS: I will offer it in Evidence then if there is no objection, Mr. Giacobbe.

MR. GIACOBBE: I have no objection to your offering the Criminal Court complaint into Evidence.

THE COURT: All right, we will deem it marked in Evidence as Defendant's Exhibit B in Evidence.

MR. ADAMS: May I read it or will the Court take cognizance of it?

THE COURT: If you want to read it, go ahead.

[61] MR. ADAMS: The complaint in the Criminal Court reads as follows: Complainant states that at the

above mentioned time and place, the defendant did approach him with a knife in his hand and did demand money from him and did swing at him a couple of times with the knife. The complainant states that he did manage to duck away from the defendant and into his home. Sworn to on September 16th, 1971.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Braxton, how old are you?
A Eighteen.
Q When were you eighteen?
A May 17th.
Q How far did you get in school?
A Eleventh year.
Q Did you complete the eleventh year?
A No.
Q Did you complete ten full years?
A Yes.
Q And where was the tenth year?
A Susan Wagner.
Q High School?
A Yes.
[62] Q And what kind of a course did you take there?
A Commercial.
Q And what age did you quit school?
A Seventeen.
Q And when you quit school, did you get yourself a job?
A Yes.
Q And where did you get a job after you quit school?
A Wagner College.
Q And how long did you work in Wagner College? Approximately?
A About five months.
Q After the five months, did you work somewhere else?
A Yes, I did.
Q Yes?

A Yes. Wait a minute. No, I didn't, no.
Q Were you working on September 15th, 1971?
A Yes.
Q Where were you working?
A Frank Alfredo's.
Q Doing what?
A Sorting metal.
Q When did you start working there in connection or [63] in reference to September 15th, 1971?
A I don't remember.
Q When did you quit working there?
A Sometime in September.
Q Now, this crime allegedly happened September 15th, '71, is that correct?
A Yes.
Q And you quit when after this crime happened?
A Yes.
Q How much after this crime happened, do you know?
A About a week.
Q About a week later?
A Yes.
Q And did you get yourself another job?
A No.
Q Mr. Braxton, have you ever used narcotics?
A Yes.
Q And what have you used?
A Heroin.
Q And are you addicted to heroin?
A No.
Q How many times have you used heroin in your life?
A I don't know. Between four months. In between four months.
[64] Q In between four months. Now, in reference to September 15th, 1971, when did you use heroin before that?
A The month before September.
Q Once or twice?
A I don't know.
Q Did you inject it youreslf?
A No.

Q How did you consume it?
A I sniffed it.
Q Did someone give it to you or did you purchase it?
A It was given to me.
Q It was given to you. Did you ever use marijuana?
A Yes.
Q And how long had you been using marijuana?
A Not long.
Q When was the last time you had any marijuana?
A I don't recall.
Q Have you ever taken any ups or downs?
A No.
Q No?
A Yes—no.
Q Have you ever been drunk in your life?
[65] A Yes.
Q How many times would you say you have been drunk?
A I don't know. I don't know.
Q You don't know? Was it a number of times?
A I would say no more than five or six times.
Q Have you also drank liquor in the Capital Bar?
A Yes.
Q And when was the last time you been in the Capital Bar?

MR. GIACOBBE: Judge, I would object, it seems to be beyond the scope of this whole case.

THE COURT: What is it for?

MR. ADAMS: Judge, I will abide by the Court's decision, I am an officer of the Court, I believe this is going to the issue of veracity, Judge, and character.

THE COURT: What's the significance of where he drank?

MR. ADAMS: I'm sorry, sir, I didn't hear.

THE COURT: What's the significance of where he had a drink?

MR. ADAMS: Correct, I think the Court is correct [66] in that. I agree on that.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Have you ever drank any liquor with Herring?
A No.
Q May I ask you, Mr. Braxton, Leon Tucker and George McCombs are friends of yours?
A George is my cousin.
Q And Leon?
A He's a friend.
Q Have you gone out with them?
A Going out?
Q Have you been out with them socially?
A I don't understand what you mean.
Q Have you gone out to parties or dances with Leon and George McCombs?
A George, I have.
Q Mr. Braxton, have you ever been in jail?
MR. GIACOBBE: Objection, Your Honor.
THE COURT: Objection sustained.
MR. ADAMS: No further cross-examination.

REDIRECT EXAMINATION

BY MR. GIACOBBE:

Q Mr. Braxton, on September 15th, 1971, did you [67] take any drugs of any kind?
A No.
Q Now, you testified this afternoon that you saw the defendant at six o'clock on September 15th, 1971, is that correct?
A Yes.
Q Had you seen the defendant Herring at any time before six o'clock on that date?
A Yes.
Q About what time was that?
A I don't remember the time.
Q Was it in the morning or the afternoon?
A It was in the afternoon.

Q Was it in the early afternoon, that is around noontime—

A No, it was just before I had seen him behind my house.

Q And where did you see him? The first time on September 15th, 1971.

A Broadway.

MR. ADAMS: Judge, may I at this time object to this, I don't know whether this is pertinent, and I don't know whether this is proper cross-examination. There were no questions asked on cross-examination in this particular vein, Judge. I think [68] it's improper redirect examination.

THE COURT: Objection sustained.

MR. GIACOBBE: Judge, this is a non-jury trial, and counsel has asked many questions, and I just have a few questions on that subject. It is non-jury, and I don't see what harm—

THE COURT: Same rules.

MR. GIACOBBE: All right, no further questions, thank you, Mr. Braxton.

THE COURT: Mr. Braxton, had you ever had occasion to talk to Clifford Herring prior to September 15th, 1971?

THE WITNESS: No, I haven't.

THE COURT: As far as you know, were there any hard feelings between your father and Clifford Herring?

THE WITNESS: I don't know.

THE COURT: You had heard that they were in the Army together?

THE WITNESS: Yes.

THE COURT: Any hard feeling between Clifford Herring and any member of your family as far as you know?

THE WITNESS: No.

THE COURT: Any disputes or fights?

[69] THE WITNESS: No.

THE COURT: Okay, anything else?

CONTINUING REDIRECT EXAMINATION

BY MR. GIACOBBE:

Q Mr. Braxton, the Judge asked you if you ever had occasion to talk to Clifford Herring before September 15th, 1971. Did Clifford Herring ever talk to you before six o'clock on September 15th, 1971?

MR. ADAMS: I object to this now, I did not object to the Court's questions, and—

THE COURT: You—

MR. ADAMS: You ruled—

THE COURT: You may object, you can object any time the Court asks a question—

MR. ADAMS: That's correct, sir, I will put in my objection now, because the same question—

THE COURT: —objection to his or my question.

MR. ADAMS: I will object at this time to the defendant's question. Rather to the prosecutor's question.

THE COURT: I will sustain the objection. Do you have any more questions of this witness, Mr. Adams?

[70] MR. ADAMS: No, sir. Judge, may I just ask this before Mr. Braxton leaves, may I just say this, Judge. Is it possible—I would like to make the request that Mr. Braxton make himself available to me in the event I may need him, because I understand this case is going over until tomorrow. I don't know what's going to happen tomorrow, Judge, and I just wondered whether the Court would direct that he make himself available when we should need him. This is a non-jury case, we should proceed as speedily as possible.

THE COURT: You may want to call him as your witness?

MR. ADAMS: Right.

THE COURT: What's your situation?

MR. GIACOBBE: If I may speak for him on that, we had gone through extensive arrangements with the United States Marine Corps to have this witness taken off an airplane yesterday afternoon and brought here. I have spoken to a sergeant from the Marine Corps, and promised we will make him available tomorrow morn-

ing to be returned back to the Marine Corps and sent on his way for basic training. He can be here tomorrow morning, but the Marines have been very generous in [71] their cooperation with us.

THE COURT: He can be here sometime in the morning.

All right, Mr. Braxton, return in the morning at ten o'clock, you can have him now.

MR. ADAMS: I have no more cross-examination at this time. I don't know what may develop, because there will be other witnesses.

THE COURT: The Marine Corps has made this trial possible by accommodating the People. We cannot keep Mr. Braxton around indefinitely, you had a chance to ask your questions.

MR. ADAMS: Right, Judge, I cannot say I have not.

THE COURT: Return tomorrow morning. Do you have any more evidence?

MR. GIACOBBE: That's all the evidence I have for this afternoon, I expect to have another witness in the morning.

THE COURT: All right, we will go over until ten o'clock.

MR. ADAMS: May I approach the Bench for a brief moment.

(At this point, a discussion was held off the [72] record.)

THE CLERK: The defendant is remanded.

(At this point, a recess was declared until ten o'clock A.M., February 4th, 1972.)

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[100]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND—CRIMINAL TERM

PART I

Ind. No. 311/1971

Attempt. robbery 1st deg.

TRIAL

PEOPLE OF THE STATE OF NEW YORK,

—against—

CLIFFORD HERRING, DEFENDANT.

County Courthouse
Staten Island, N.Y.
Friday, February 4, 1972
2:22 p.m.

BEFORE:

HONORABLE THEODORE G. BARLOW
Justice of the Supreme Court

APPEARANCES:

JOHN M. BRAISTED, JR., ESQ., District Attorney
Appearing for the People

By: ANTHONY I. GIACOBBE, ESQ., ADA, of Counsel

SEYMOURE ADAMS, ESQ.
Appearing for the Defendant

IRWIN GOLDSTEIN
Official Court Reporter

[101] (At 2:22 p.m. defendant assumes seat at counsel table.)

3/1/1971, People against Clifford Herring. People by Mr. Giacobbe; defendant by Mr. Adams. Defendant is present with counsel. Are both sides ready to proceed?

MR. GIACOBBE: People ready.

THE DEFENDANT: Your Honor, I would like to read a statement to the Court, please.

THE COURT: You have an attorney.

(Defendant hands paper to Mr. Adams.)

MR. ADAMS: Judge, in essence, the statement that the defendant hands to the Court, is the fact that he feels I have not represented him properly. Now, Judge, I will hand the papers to you. The Court, whatever it sees fit—

THE COURT: Mark that as Court's exhibit one.

(Defendant's handwritten statement marked Court's exhibit 1.)

THE COURT: You wish to discharge your attorney?

THE DEFENDANT: Not at this particular point, your Honor. I would like my statement read.

THE COURT: Because I will. I will read it [102] for the record, although the letter, whatever it is, is in evidence.

"If the Court please, your Honor, I have a statement to make. It seems to me that my counsel has failed to give me a probable—probably means proper—representation concerning my trial. Your Honor please, I have obtained evidence to prove that this Honorable Court, that my counsel has completely disregarded these matters. I, your Honor, at this present time I am willing to confront this Honorable Court with the evidence that the district attorney is aware of such evidence existing. The district attorney obtained that evidence in the criminal court. The district attorney made an open statement to the Court that he, the district attorney, was given reliable info by three officers that at the time the alleged crime was committed, that the defendant was working. I ask this Honorable Court and my counsel to obtain a

copy of the said minutes from the criminal court in order to sustain my statement in this court. The district attorney made this said statement in open court that he, parenthesis, DA, closed parenthesis, has received info by, maybe it is three officers, which he [103] believed at that time that the info was reliable from reliable persons. Mr. Gilroy, my former attorney, was present when this info was given to the district attorney."

Get Gilroy.

"The district attorney, on obtaining that said info, made a motion to the Court that the district attorney receive that info which convinced him to make a motion to the court to have the defendant paroled in his own custody. Therefore, I request that this Honorable Court issue an order to obtain these three officers and Mr. Gilroy, and the district attorney be brought in this court to verify my alleged statements. Thank you, your Honor, for your time and consideration."

MR. ADAMS: Judge, since the Court has read this into the record, I think I have the right to very briefly defend myself, Judge.

THE COURT: I will hear you.

MR. ADAMS: You know, Judge, I have been practicing for 22 years, and I am just that type of a nut, in quotes, to go out of my way—

THE COURT: Mr. Adams—

MR. ADAMS: No, I want to tell this Court. [104] I spent five hours at the risk of my life, Judge, on Wednesday, in an area that many white people wouldn't go into. And I spent my time until midnight tracing down some of the things this particular defendant says. I would like to withdraw at this time, Judge.

THE COURT: Mr. Adams, I will deny your application to withdraw. When this trial is over, I will give you an opportunity to make a statement for the record. But at this time we are in the middle of a trial. Now, Mr. Herring, I ask you again, do you want me to discharge Mr. Adams as your attorney?

THE DEFENDANT: Your Honor—

THE COURT: Do you understand this, before you make a decision—

THE DEFENDANT: Your Honor—

THE COURT: Just hear me.

THE DEFENDANT: —all I'm asking is that I get my proper witnesses together, the information, and this is all I'm asking. This is all I'm asking, Your Honor.

THE COURT: Well, Mr. Herring, I ask you again—

THE DEFENDANT: I'll keep my lawyer, I'll keep [105] my lawyer.

MR. ADAMS: I request to withdraw, Judge.

THE COURT: I cannot allow you to withdraw at this point, Mr. Adams. I realize that this is a trying situation, but I cannot permit you to withdraw at this point.

MR. ADAMS: I can appreciate the position the Court is in, but at the same time, Judge, I don't want to be maligned.

THE COURT: I will hear you after the trial is over. Now, I will get Mr. Gilroy here. I have no other names that have been disclosed to me by your statement that I just read into the record. There is no one else I can summon on your behalf, even though, of course, it is not my responsibility to find witnesses for the defense or the prosecution. But I will get Mr. Gilroy and make him available to you, Mr. Herring, and Mr. Adams. Now, let us proceed with the trial. Call your next witness.

MR. GIACOBBE: Mr. Stubbs.

WILFRED STUBBS, called as a witness in behalf of the People, after first being duly sworn, testified as follows:

[106] (The witness states he resides at 247 Westwood Avenue, Staten Island, N.Y.)

(2:30 p.m.)

DIRECT EXAMINATION

BY MR. GIACOBBE:

Q Sir, on September 15, 1971 were you employed by the New York City Housing Authority as a police officer?

A I was.

Q Were you on duty, sir, in the afternoon of that day?

A Yes.

Q Do you know Allen Braxton, the complainant in this case?

A Yes.

Q Do you know Clifford Herring, the defendant in this case?

A Yes.

Q Did you know them both prior to September 15, 1971?

A Yes.

Q On September 15, 1971, what area were you assigned to?

A Markham Homes, in West Brighton, Staten Island.

Q Now, shortly after 5 p.m. on September 15, 1971, did you have occasion to go into the home of Allen [107] Braxton on Staten Island?

A Yes, I did.

Q Where was his home located?

A Seven Markham Drive, I believe.

Q What was the purpose of your going into his home?

A I was—

MR. ADAMS: Objected to, unless it has some connection with this particular crime, Judge.

THE COURT: Overruled, I will take this.

A I was checking out a particular building in the housing development that had a lot of drug traffic; had it under surveillance.

BY MR. GIACOBBE:

Q Were you making your surveillance from the inside of the Braxton Home?

A Yes, I was.

Q What time did you leave the Braxton home?

A A little after five.

Q Where did you go from there?

A I went to another building, adjacent to this building I had under surveillance.

Q Who lived in the building that you next went to?

A Allen Braxton's uncle.

[108] Q What is his name?

A Herman Braxton.

Q How far was the home of Mr. Herman Braxton from the home of the complainant Allen Braxton?
A Approximately hundred feet.
Q When you went to the home of Mr. Herman Braxton, did you go inside that house?
A Yes, I did.
Q Did you remain inside that house?
A Yes, I did.
Q When did you leave that house?
A Approximately about 20 to six, roughly.
Q Where did you go when you left?
A I went to the—I checked around—I walked around the area.
Q Did you stay in that area?
A No. I came back to that area.
Q In other words, you left it and then came back?
A Yes.
Q Now, after you came back, did there come a time when you saw Allen Braxton, the complainant in this case?
A Yes.
Q Approximately when was that?
[109] A It was a little after six.
Q Where were you when you saw him?
A I was at the rear of 51 Wayne Terrace.
Q What did he tell you, if anything, when he saw you?
MR. ADAMS: Objected to, unless it was said in the presence of the defendant, sir.
THE COURT: Objection sustained.

BY MR. GIACOBBE:

Q Did he tell you something?
A Yes, he did.
Q After he told you something, what if anything did you do?
A I took Mr. Braxton around the area and I checked around the area.
Q What were you checking for?
A I was looking for Mr. Clifford Herring.
Q The defendant in this case?

A Yes.

Q What areas did you look in?

A I checked all of the Markham Homes, the whole area of the Markham Homes, all the ways up to Henderson, up Broadway.

Q Was Allen Braxton with you during that period [110] of time?

A Yes, he was.

Q Approximately how long a period of time did the two of you stay together for the first time?

A Approximately 20, 25 minutes.

Q What happened after that?

A I told Mr. Braxton if he happened to see Mr. Herring around the area, to let me know, and I went back to patroling the Markham Homes.

Q Now, before the time when you and Mr. Braxton separated—I withdraw that question. From the time that Braxton first spoke to you by his uncle's house, where did you and Braxton go, if any place, right away from there?

A We went to a police room. We have a room at the Markham Homes. It's just with a telephone.

Q What did you do at the police room?

A I called the other officer I was working with. He was working up the West Brighton Houses, and I told him to be on the lookout for Mr. Herring.

Q And then you say it was during this period that took 20 or 25 minutes, I believe you said, that you and Braxton stayed together. Right?

A Yes.

[111] Q After you and Braxton separated, did you and Braxton see each other again?

A Yes, we did.

Q How much time passed before that happened?

A I'd say approximately about an hour.

Q When you saw Braxton, where was it?

A I seen him on Broadway.

Q Who else, if anyone, did you see?

A I see Mr. Herring.

Q Were they together?

A No, they were not.

Q Where was the defendant Herring and where was Braxton?

A The defendant Herring was—I'd say he was on—I would say the east side of Broadway. That would be PS 18 side, and Mr. Braxton was on the project side, that would probably be the west side of Broadway.

Q What side were you on?

A I was coming up the west side, the project side, and I seen Mr. Herring on the opposite side of the street, and I walked over to that direction.

Q How long was this now from the time that you had left Braxton before?

A I'd say approximately an hour.

[112] Q Now, what did you do when you crossed the street to the side that Herring was on?

A I walked over to Mr. Herring and I told him that Mr. Braxton said that he attempted to rob him.

Q What did Herring say to you?

A Mr. Herring said that he was looking for me, that he heard I was looking for him, and he said that he would—I asked him would he come over to the office with me, and he agreed to come under his own free will.

Q But he said to you that he had heard that you were looking for him. Is that correct?

A Yes.

Q Was he placed under arrest at that time?

A No, he wasn't placed under arrest at that time.

Q What did you do after you apprehended him on the street?

A I asked him to come to the police room in West Brighton Houses, and he came to the police room, and I told him what the situation was, that Mr. Braxton said he attempted to rob him, and Mr. Herring denied it.

Q Was Braxton there at the time?

A Yes, he was.

Q Was the defendant placed under arrest at that time?

[113] A Yes, he was.

Q Now, did you search the defendant?

A Yes, I did.

Q What if anything did your search reveal?

A I found a small knife and—
Q Was it a knife or—
A A knife on one end, a—
Q May we see what you found?
A Yes.

(Witness produces.)

Q Now, what is being handed to me now, is this what was taken from the person of Clifford Herring?
A Yes.
Q And is it in substantially the same condition now as it was in at the time that you took it from his person?
A Yes.
MR. GIACOBBE: Your Honor, at this time I offer this into evidence as People's Exhibit 1.
MR. ADAMS: May I ask some questions in reference to this, Judge?
THE COURT: You may.

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[114] (2:38 p.m.)

VOIR DIRE EXAMINATION

BY MR. ADAMS:

Q When you took this from Mr. Herring, where did you put this?
A Where did I put it?
Q Yes.
A I put it into a white envelope that I had.
Q What did you do with the white envelope after that?
A I brought the white envelope down to the precinct, and the precinct gave me a brown envelope, manila envelope.
Q Gave you what?
A This manilla envelope (indicating).
Q And you put it in this manila envelope?
A Yes.
Q Has this always been in your possession?
A No, it was at the police property clerk.

Q Now, you said you placed the defendant under arrest when you got to the police office. Is that correct?

A Yes.

Q Did he have anything else on him besides this?

A No, sir.

Q Nothing else?

[115] A Just personal items, his wallet, and I returned his wallet to him.

Q I see. Now, you are a housing authority police officer. Is that correct?

A I was.

Q You were?

A Yes.

Q You are not now?

A No, I'm not.

Q At that time, though, you were?

A Yes, I was.

Q And you allege that you have authority to arrest someone?

A Yes, I do.

MR. GIACOBBE: Objection, your Honor, objection.

THE COURT: Yes, you wil get a chance to cross-examine this witness. This is just a voir dire on the admissibility of People's exhibit one. Have you completed your voir dire?

BY MR. ADAMS:

Q Did Mr. Herring consent to you searching him?

A I placed him under arrest.

Q When you pleased him under arrest, did you have any kind of a statement at that time from Mr. [116] Braxton, a written statement?

A No, I did not have any written statement, sir.

Q So that even though Mr. Herring denied the thing, you still placed him under arrest. Is that correct?

A Yes, sir.

Q What was Mr. Herring wearing when you arrested him?

A He was wearing a grey suit, and I can't recall now the type of outer garment that he had. He had a grey suit on, a sport jacket.

MR. ADAMS: Judge, I object to this on the grounds that it is a result of an illegal search and seizure.

THE COURT: You had placed the defendant under arrest before you searched him and found that. Is that correct?

THE WITNESS: Yes.

THE COURT: Objection overruled. That will be received in evidence as People's exhibit one.

(Thereupon, chain with two instruments received in evidence and marked People's Exhibit One.)

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[117] (Cont. 2:42 p.m.)

DIRECT EXAMINATION

BY MR. GIACOBBE:

Q Sir, approximately what time was it when you saw the defendant Herring on Broadway near PS 18?

A Approximately about 8 o'clock.

MR. GIACOBBE: Thank you very much. I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Stubbs, how long had you been working as a —I am sorry, Judge.

THE COURT: Go right ahead.

Q How long, Mr. Stubbs, had you been working for the housing authority as a police officer prior to September 15?

A Three years.

Q Subsequent to September 15th?

A About four more months.

Q Four months. So that you recently quit, or you were removed?

MR. GIACOBBE: Objection, your Honor. When was his employment ended?

Q Say four months after September 15—I will withdraw that, Mr. Giacobbe. Tell us the date when you terminated your work with the housing authority [118] police?

A December 2nd.

Q Was it at your choice?

MR. GIACOBBE: Objection, your Honor; that is irrelevant and immaterial to this case.

MR. ADAMS: No, I don't think it is, Judge.

MR. GIACOBBE: It certainly is, your Honor.

THE COURT: I will take it subject to connection. You may answer it.

A I was dismissed.

BY MR. ADAMS:

Q Now, between September 15 and December 2, 1971, how many arrests did you make? Approximately, if you don't know.

A Approximately seven or eight.

Q Seven or eight?

A Yes.

Q And, Mr. Stubbs, did you testify here in response to Mr. Giacobbe's questions here, did you make any reports concerning this entire incident?

A Only at the housing level.

Q Did you make reports there?

A Yes.

Q And you have those reports with you?

[119] A No, that's housing authority.

Q Now, in order to testify here today, did you review those reports?

A No, I did not review. No, sir.

Q You did not look at them at all?

A No, sir.

Q When did you make out those reports?

A The night that I arrested Mr. Herring.

Q The night that you arrested Mr. Herring?

A Yes.

Q And since then you have not looked at those reports?

A No, I haven't, sir.

Q Now, you testified before the grand jury, did you not?

A Yes, sir.

Q Did you read your grand jury testimony?

A Did I read my grand jury?

Q Yes.

A No, sir.

Q Did you speak to Mr. Giacobbe prior to this date?

A Yes, I did.

Q When did you speak to Mr. Giacobbe prior [120] to today?

A This afternoon.

Q I said prior to today, before today.

A Oh, at the grand jury.

Q I see. And then next you spoke to him today. Is that correct?

A Yes.

Q Did you discuss the evidence or the testimony with Mr. Giacobbe that you were going to give today? Did you discuss it?

A Yes.

Q Did Mr. Giacobbe tell you the testimony that was given by Mr. Braxton?

A No, he did not.

Q Mr. Giacobbe—

MR. ADAMS: With the Court's permission, may I look at the grand jury testimony of the police officer?

THE COURT: You may.

MR. GIACOBBE: Your Honor, may the record show that I am handing to Mr. Adams at this time the testimony given by this officer consisting of pages 10 through 14 on the same date as the testimony given by the complaining witness (handing to [121] Mr. Adams).

BY MR. ADAMS:

Q Now, the pages that Mr. Giacobbe gave, did you ever read this prior to your ascension on the stand today?

A No, I did not.

Q Now, this report that you made to the housing authority, was it on housing authority forms?

A Yes.

MR. ADAMS: Judge, at this time I don't think it is improper, perhaps it is, but I will submit to the Court, I think that the defense is entitled to look at those housing authority reports completed by Mr. Stubbs in reference to this incident, and I respectfully request that they be produced.

THE COURT: Do you have then with you?

THE WITNESS: No, I do not.

THE COURT: Do you have the reports?

MR. GIACOBBE: No, I don't, your Honor.

MR. ADAMS: I will leave that go for the moment, please, Judge.

BY MR. ADAMS:

Q Mr. Stubbs, when you arrested the defendant, he [122] told you he did not commit this crime. Is that correct?

A That's correct.

Q He told you, I think, that he was working. Is that correct?

A That's correct.

Q And did he tell you he was working for some fellow by the name of Taylor on Campbell Avenue?

A That's correct.

Q And Mr. Taylor spoke to you on that particular evening. Is that correct?

A I didn't hear the question.

Q Mr. Taylor spoke to you that evening, did he not? You called him, didn't you?

A I attempted to call him.

Q You never reached him?

A No, I didn't reach him that night.

Q I see. Did you reach him the following morning?

A Yes, I did.

Q Did Mr. Taylor tell you that Mr. Herring was working for him?

MR. GIACOBBE: Judge, objection. That is hearsay, pure hearsay.

[123] THE COURT: I will take it.

A Doing—

BY MR. ADAMS:

Q Yes or no.

A Yes.

Q Did he tell you he was working for him?

A Yes.

Q And did he tell you that he was working for him at or about 6 p.m. on September 15, 1971?

MR. GIACOBBE: Judge, now, Judge, I object, that is the most fundamental form of hearsay. I have no chance to cross-examine the person that is allegedly making these statements. Pure hearsay, Judge.

MR. ADAMS: Judge, this is part of the investigation made by this particular witness.

MR. GIACOBBE: It is still hearsay, Judge.

THE COURT: Overruled.

MR. ADAMS: Yes, sir.

THE COURT: You may answer.

A Ask the question again.

THE COURT: Would you read the question back?

(Thereupon, the Reporter read the last question.)

A Yes, he did.

[124] MR. ADAMS: One second, please.

THE COURT: Did he tell you what Mr. Herring's hours were to September 15th?

THE WITNESS: He didn't tell me what his hours were, your Honor.

THE COURT: That he was working at or about 6 o'clock on September 15th?

THE WITNESS: Yes, sir.

THE COURT: And this call was made the day after, that would be the 16th of September?

THE WITNESS: Yes.

THE COURT: Proceed.

BY MR. ADAMS:

Q Was it a call, or was it a personal conversation that you had with Mr. Taylor?

A Yes, it was.

Q A personal conversation?
A Yes.
THE COURT: You talked to him personally?
THE WITNESS: Yes.

BY MR. ADAMS:

Q And that was in the courtroom on Targee Street. Is that correct?
A It was not in the courtroom.
[125] Q In the vicinity of the courtroom, shall we say?
A Yes.
THE COURT: Does Mr. Taylor have a first name, as far as you know?
THE WITNESS: I did know it at the time, but I'm not familiar with it right now, your Honor.

BY MR. ADAMS:

Q Does Mr. Donald Taylor refresh your recollection?
A It could—yes, it refreshes it, somewhat. Somewhat, it is familiar.
Q Did you look in the wallet of Mr. Herring when you arrested him?
A Yes, I did.
Q Was there any money in there?
A No, there wasn't.
Q Nothing at all?
A No money.
Q Any silver on him?
A He may have had something. I don't recollect right now.
Q So to get this thing straight in my mind, if I may, Mr. Stubbs, you tried to reach Mr. Taylor on the 15th of September, and you couldn't get him?
[126] A Yes.
Q Then Mr. Herring was arrested and booked at the stationhouse. Right?
A Yes.
Q And then the following morning he was in the criminal court. Is that correct?

A That's correct.

Q Did you see Mr. Taylor after his arraignment—after Herring's arraignment in the criminal court?

A That's correct.

MR. ADAMS: Judge, may I have a moment, please?

THE COURT: You may.

(Mr. Adams peruses transcript.)

BY MR. ADAMS:

Q Mr. Stubbs, when you approached Mr. Herring on Broadway—was it Broadway?

A Yes.

Q —did you then, at that particular moment, tell him that he had been accused of committing a crime?

A Yes.

Q Did you tell him who accused him?

A Yes, I did.

Q Did he tell you at that time that it couldn't [127] be me, I haven't been in the area all that day?

A No, he didn't say those words.

Q What exactly did he say? If you recall.

A I recall him saying that he didn't do it, he couldn't have done it.

Q Mr. Stubbs, may I read, with the approval of the Court, page 12, line 5, a question and answer given to you by Mr. Braisted in November, 1971, and see if you recall this, sir? Question: What happened when you located him? Referring to Mr. Hering. Answer: Approached him and told him we had a problem in project. Someone had stated you had attempted to rob him. So he goes, no, it couldn't have been me because I haven't been here all day. Do you recall that, sir?

A If I said it—

Q Is that approximately correct?

A Approximately correct.

MR. ADAMS: One moment, please, Judge.

(Mr. Adams confers with defendant.)

MR. ADAMS: Excuse me, sir.

(Mr. Adams confers with Mr. Giacobbe.)

BY MR. ADAMS:

Q Mr. Stubbs, I believe in response to Mr. [128] Giacobbe's question, and correct me if I am wrong, you stated that at that particular time, on or about September 15th, you were investigating the area there for possible narcotics violations. Is that correct?

A That's correct.

Q Do you know whether Braxton was an addict, or took any kind of narcotics?

A No, I don't.

Q You don't know.

A I don't know.

Q When was the first time, may I ask you, that you saw Braxton on September 15th? May I say this? I believe you said that you were in the Braxton house a little bit after 5 o'clock. Is that correct?

A Yes.

Q Did you see him in that house at all?

A I can't recall, because I spoke only with the mother.

Q Do you recall whether he came in or out before you left?

A No, he didn't come in or out.

Q He didn't come in the house?

A While I was there.

Q While you were there. So the next time you saw [129] him is when he came looking for you up the street, after leaving the Braxton home. Is that correct?

A That's correct.

Q And that I assume would be shortly after 6 o'clock?

A Thats' correct.

Q And that was the first time that day you had seen him?

A I can't recall. I really can't.

Q But anyway, you did not see him on or about 5 or 5:15?

A I can't recall if I had seen him—no, I can't recall if I had seen him.

Q Now, did you ask Herring what he did with this particular item?

A I did not.

Q You never did?
A No.
Q Do you recall this question and this answer allegedly given by you to the grand jury? Page 13, line 14. Question: What did he say about it? Answer: He said he cleaned his fingernails with it. Does that refresh your recollection?
A I may have said that at the time.
[130] Q Well, if you said it at the time, was that the truth?
A It was the truth.
Q Officer, do you know whether Braxton was ever convicted of a crime?
MR. GIACOBBE: Objection, your Honor.
THE COURT: Sustained.

BY MR. ADAMS:

Q Officer, do you know whether Braxton ever made any other complaints similar to this one against a fellow by the name of Ralph Mason?
MR. GIACOBBE: Objection, your Honor.
THE COURT: Sustained.

BY MR. ADAMS:

Q Do you know a Ralph Mason, officer?
A No, I do not.
MR. ADAMS: All right, Judge.
MR. GIACOBBE: Thank you, sir. I have no further questions. People rest. If your Honor please, the testimony of this witness completes the People's case. People rest.

(People rest at 3:02 p.m.)

THE COURT: Do you have any motions?

[131] MOTIONS IN BEHALF OF DEFENDANT AT END OF PEOPLE'S CASE

MR. ADAMS: Judge, at this time I move to dismiss the indictment of this particular matter against the defendant, on the grounds that as a matter of law the

People have failed to prove the guilt of the defendant beyond a reasonable doubt.

Do you want to hear me extensively on that, Judge? Or I have a witness here, I can go on, or would you rather hear me on some lengthy argument subsequently, Judge?

THE COURT: I will hear anything you have to say.

MR. ADAMS: All right. Judge, I believe here that as a matter of law we have a doubt here. Firstly, on this first witness of the prosecution here, Judge. There were numerous inconsistencies, and I will not bore the Court reading that. Of course the Court has copious notes on it, and I am sure it is very fresh in the Court's mind. But on top of that, Judge, we have a questionable complainant, with a questionable way of how it happened, no witness other than this complainant.

An officer who checked out this particular matter testified here and said that the man was [132] working at that time. A definite denial by the defendant. And I believe that as a matter of law, Judge, there is a reasonable doubt here.

THE COURT: As to the first two counts, the motion is denied. The motion is granted as to the third count. The Court is of the opinion that People's exhibit one is not a dangerous instrument within the purview of the statute.

MR. ADAMS: So at this time, Judge, do I gather that count three was dismissed?

THE COURT: Exactly.

MR. ADAMS: Right, sir.

THE COURT: Now, one and two remain.

MR. GIACOBBE: Judge, if I may be heard on count three. The basis of the charge—start with the first count, the defendant is charged with attempted robbery. The allegation is that in connection with that robbery, he used a dangerous instrument.

Now, in connection with that count, he is charged in the third count with possession of the weapon that was allegedly used at the time of the robbery, not necessarily this instrument. So that if the Court were to find

the defendant might have [133] used a knife, but that this was not the knife, that is the contention here.

THE COURT: That is the possibility. But on the third count all I have is People's exhibit one, and I don't think that is a dangerous instrument as contemplated by the statute.

MR. GIACOBBE: Judge, we are talking now only on the question of a prima facie case, we are not talking reasonable doubt yet.

THE COURT: I understand.

MR. GIACOBBE: And we do have the evidence that has been testified to by the complaining witness that the defendant at the time of the robbery displayed a blade which the defendant allegedly swung at him. And that is the weapon that we are referring to in count three.

THE COURT: In other words, the People are conceding that the weapon used at the time of the alleged robbery was the same one that is in evidence as People's exhibit one and no other?

MR. GIACOBBE: I am saying that whether or not People's exhibit one is the weapon—whether this exhibit is the weapon that was used by the defendant in count three and one, that is a question [134] of fact for the Court to decide.

THE COURT: Yes.

MR. GIACOBBE: But again, that is a separate issue, I would submit, from the issue of whether or not he had a weapon at the time of the robbery.

THE COURT: I haven't dismissed the first count.

MR. GIACOBBE: I know that.

THE COURT: I haven't dismissed the second count. I only dismissed the third count.

MR. GIACOBBE: Assume for the sake of argument on this motion that the complainant's testimony was true, in that case I would submit that we made out a prima facie case on the first count. And if we have on the first count, then we must also on the third count, because the third count—

THE COURT: Assuming it is the same instrument.

MR. GIACOBBE: Let us assume for the sake of argument that nothing was recovered from the person of the defendant. The weapon in the third count that we—

THE COURT: I see, you are reversing it, you want me to make a judgment at least of this stage of the prima facie, that it might have been another [135] weapon.

MR. GIACOBBE: That is correct, yes.

THE COURT: And that it was that position at that time.

MR. GIACOBBE: Yes.

THE COURT: That is too far fetched. The third count is dismissed. We will take a short recess. I will take some of the other matters here. Remand.

(At 3:07 p.m. defendant is remanded and trial is recessed.)

AFTER RECESS

(At 3:46 p.m. defendant assumes seat at counsel table.)

MR. ADAMS: One moment please, sir.

(Mr. Adams confers with defendant.)

THE CLERK: Indictment number 311/1971, People against Clifford Herring. People by Mr. Giacobbe, defendant by Mr. Seymoure Adams. Both sides ready to proceed?

MR. GIACOBBE: People ready, your Honor.

MR. ADAMS: Judge, may we put this matter over to Monday morning?

[136] THE COURT: Mark it for 10:30, Monday morning. I have a calendar. Defendant is remanded.

(At 3:48 p.m. defendant is remanded. Trial is adjourned to 10:30 a.m., Monday, the 7th day of February, 1972.)

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[137]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND—CRIMINAL TERM

PART I

Ind. No. 311/1971

Attempt. robbery 1st deg.

TRIAL

PEOPLE OF THE STATE OF NEW YORK,

—against—

CLIFFORD HERRING, DEFENDANT.

County Courthouse
Staten Island, N.Y.
Monday, February 7, 1972
11:02 a.m.

BEFORE:

HONORABLE THEODORE G. BARLOW
Justice of the Supreme Court

APPEARANCES:

JOHN M. BRAISTED, JR., ESQ., District Attorney
Appearing for the People

By: ANTHONY I. GIACOBBE, ESQ., ADA, of Counsel

SEYMOURE ADAMS, ESQ.
Appearing for Defendant

IRWIN GOLDSTEIN
Official Court Reporter

[138] THE CLERK: Case on trial, indictment 311/1971, People versus Clifford Herring, by Mr. Adams.

(Defendant is not present.)

MR. ADAMS: Judge, at this time I want to restate to the Court that I entered the chambers with the consent of the Court at the request of a Mr. Taylor, who was subpoenaed into court today. He tells me that it is difficult for him to stay in court due to the fact that he had an accident in his business over the week in which one of his trucks jacknifed, or turned over, one of his drivers was killed. And he would like to work out something with the Court as far as his testimony.

THE COURT: Mr. Taylor, we can take your testimony right now, except that the Department of Corrections has not delivered the prisoners. You know, we can't try the case without the defendant, who is apparently on his way. Now, would it be convenient for you to return at 3 o'clock this afternoon?

MR. TAYLOR: I would be pretty well tied up, sir, there are quite a few things to do.

THE COURT: Well, would 4 o'clock be better for you?

MR. TAYLOR: I wouldn't want to say yes if I [139] can't be here. I am saying, it is not that I don't want to be here. The idea is, I have problems with the insurance company, the fellow's death, I have to straighten something out with his brother.

THE COURT: Would tomorrow morning be convenient for you?

MR. TAYLOR: I can't say. I would like to put it off another week, I have so many problems to straighten out.

THE COURT: We are in the middle of a trial. What does anybody propose?

MR. GIACOBBE: Judge—

THE COURT: I understand he has given a written statement. Have you seen it?

MR. GIACOBBE: No, I haven't seen it.

THE COURT: Why don't you show it to him?

(Mr. Adams hands paper to Mr. Giacobbe.)

MR. GIACOBBE: Along the lines he mentioned to me the other day when I interviewed him personally, Judge.

THE COURT: Would you come up, gentlemen?

(Mr. Giacobbe and Mr. Adams confer with the Court off the record before the bench.)

THE COURT: Mr. Taylor, I am afraid I will have [140] to direct you to return at 2 o'clock. We will get you out of here as fast as we can, but your testimony is critical in this case. A man faces a charge for which he could receive a sentence of 15 years in jail. If you have anything that is essential to this case, we must hear it. I am sorry if it is inconvenient to you.

MR. TAYLOR: I gave to the lawyer—

THE COURT: It is different, it has to be taken.

MR. TAYLOR: I have to be here at two?

THE COURT: Be here at two.

MR. TAYLOR: Very good.

(At 11:25 a.m. case set aside, to be later recalled.)

(At 2:05 p.m. case duly recalled. Defendant assumes seat at counsel table.)

THE COURT: Case on trial, indictment 311/1971, People against Clifford Herring. Mr. Giacobbe for the People, Mr. Adams for the defendant. Are both sides ready to proceed?

MR. GIACOBBE: People ready.

MR. ADAMS: Defendant ready.

[141] THE COURT: Call your witness.

DONALD TAYLOR, called as a witness in behalf of the defendant, after first being duly sworn, testified as follows:

(The witness states he resides at 375 Mountainview Avenue, Staten Island, New York.)

(2:07 p.m.)

DIRECT EXAMINATION

BY MR. ADAMS:

Q Mr. Taylor, you were subpoenaed into court by my subpoena. Is that correct?

A Correct.

Q And that subpoena had the so ordered by Judge Barlow. Is that correct?

A That's correct.

Q And I did speak to you last week about coming into court. Is that correct?

A That's correct.

Q Did you tell me that you were busy and tied up, and it was impossible, you would rather not come to court? Is that correct?

A That's correct.

Q Now, I call your attention specifically to September 15, 1971. Now, what firm were you connected with at that time?

[142] A A and A Tank Cleaning.

Q Location?

A 116 Campbell Avenue, Staten Island.

Q On September 15, 1971, sometime in the evening thereof, did you go down to the 120 Precinct?

A Yes, I did.

Q On the following morning, September 16, 1971, did you go down to the criminal court on Targee Street?

A That's correct.

Q And both times was it in reference to Clifford Herring?

A That's correct.

Q Now, were you called to go down to the precinct?

A Yes, I was.

Q Do you know by whom?

A Clifford Herring.

Q Down at Targee Street you spoke to the police officer?

A Yes, I did.

Q The name of Stubbs. Is that correct?

A I couldn't tell you his name offhand, to be honest with you.

[143] Q And you arrived on September 16th in court subsequent to the arraignment of Clifford Herring. Is that correct?

A That's correct.

Q Now, on September 15, 1971 was defendant Herring on your premises at 116 Campbell Avenue around 6 p.m.?

A Yes, I had seen him on the premise.

Q Did he work for you on and off prior and subsequent to September 15, 1971?

A To my knowledge, I didn't go into the payroll book, so forth like that, before he had worked for me, yes.

Q And how about subsequently?

A I couldn't answer you truthfully.

Q Now, he has a pay slip from you showing week ending October 1, 1971. Does that refresh your recollection, that he did work for you after September 15th?

A At that particular time we were paying—a man would work a week, and then the following week he would get his check, like that Friday. So naturally he—every payroll was like one week behind. If a man was, say for argument sake, there was no work for him, the following week he would get that finalized check. He always had a check coming to him a week later.

[144] Q Now, to the best of your recollection, was the defendant Herring on your premises on September 15, 1971 at or about 6 p.m.?

A The time, I couldn't give you a precise time, by no means, because I was busy in the office, in and out of the office. He was on or about the premise about that time. To give you the exact time, what location he was, I couldn't give.

Q He was in and out?

A Yes.

Q When you say in and out, that is in the yard and in the office?

A As far as my knowledge, he was in between both areas.

CROSS-EXAMINATION

(2:11 p.m.)

BY MR. GIACOBBE:

Q Mr. Taylor, are you the president of the A and A Cleaning Company?

A Yes, sir.

Q And you mention that on September 15th, you mentioned a Campbell Avenue address. Is that correct?

A That's correct, that is the shop.

Q Campbell Avenue, sir, is that a street that [145] runs between Broadway and North Burgher Avenue on Staten Island?

A The exact streets—North Burgher. It's not Broadway, it's another street up further. Exactly what street it is, I don't know offhand.

Q Are you familiar with North Burgher Avenue in Staten Island?

A That should be the street right down the block from the shop.

Q Are you familiar in the direction in which North Burgher Avenue runs?

A It travels this way, east.

Q It runs up from Henderson Avenue up Castleton Avenue, is that correct, and then above Castleton and below Henderson?

A It runs the opposite way, between Broadway and whatever the following street is on this side.

Q North Burgher Avenue, generally speaking, could you say it runs north and south?

A I couldn't tell you.

Q Does North Burgher Avenue run the same way that Broadway runs?

A Castleton Avenue runs the same as Broadway.

Q Castleton Avenue and Broadway—

[146] A Run this way, same exact way.

Q Castleton Avenue and Broadway run perpendicular to each other, do they not, they cross?

A No. They are behind each other. In other words, my shop is actually on Castleton Avenue and Broadway is the following street next to it.

Q Do you live on Staten Island?
A Yes, I do. I am not very familiar with the homes.
Q Are you familiar with the location of PS 18 on Staten Island?
A That should be the school right up the hill.
Q PS 18 is in West Brighton, is it not?
A That's right.
Q And PS 18, there is a new building to it, an old building, is there not?
A That's right.
Q And the new building is now on the corner of Henderson Avenue and—
A Broadway.
Q —Broadway. Is that right?
A Correct.
Q And the older portion of PS 18 is also partly on Broadway. Is that correct?
A Broadway, correct.
[147] Q That is up closer to Castleton. Is that right?
A That's correct.
Q Now, at that point, Broadway and Castleton cross each other, don't they?
A Broadway and Castleton do, yes.
Q So that they are perpendicular to each other. Is that correct?
A I'm sorry, that's right.
Q Campbell Avenue, does that run the same way as Castleton?
A No, it runs the same as Broadway.
Q Where does Campbell Avenue start and where does it finish, as far as you know?
A The exact streets I couldn't tell you, to be honest with you.
Q Does Campbell Avenue start approximately by the old PS 18 schoolhouse building?
A Directly up behind the old schoolhouse.
Q And Campbell Avenue goes down towards Henderson Avenue?
A Right, down, towards the projects.

Q In other words, Campbell Avenue starts around the old PS 18, crosses Henderson, goes down below [148] Henderson to the projects. Is that correct?

A Right, two blocks.

Q And when you talk about the projects, do you mean the Markham Home project?

A That's correct.

Q Campbell Avenue, it starts by PS 18 and goes down to the projects; do you know if Wayne Street is the street that Campbell Avenue comes into? In other words, it makes a dead end on Wayne Street?

A To be honest with you, I couldn't tell you. I am not very good with the streets, and the names of the streets.

Q The garage that you were working out of on September 15, 1971, was that located on Campbell Avenue below Henderson Avenue or above Henderson?

A It's below.

Q So that it is located near the area where the projects begin. Is that correct?

A That's right, half a block away.

Q Now, Campbell Avenue does go in—it ends at a street that runs perpendicular to it by the projects?

A That's right.

[149] Q Assume now that that street is Wayne Street, how far from Wayne Street and Campbell Avenue, how far up was the garage located that you were working out of?

A A half a block.

Q Now, do you know where Markham Court is?

A No, I don't.

Q Do you know where Markham Road is?

A To be honest with you, I don't. I am only here six months, to clarify myself, I am only here six months. Which one is the other is Greek to me. If it was in Brooklyn, I could tell you.

Q You don't know the streets in the Markham Homes?

A No, I don't.

Q In any event, the garage you were working out of is half a block up from the end of Campbell Avenue?

A That's right.

Q Which is where the projects began. Is that correct?

A Right.

Q Now, what type of work was being carried on at the garage that you were at on September 15, 1971?

[150] A At that particular time, at night, normally the trucks were on there way in, whichever were out, and you are parking vehicles, and entering the sludged product off the trucks into trailers in the yard, taken to the dumps.

Q What kind of building is located at the Campbell address you gave us?

A Type? What do you mean?

Q A garage, or an office?

A It's a garage. There was a small office there that we were working out of at that time.

Q So is it correct to say the building you were working out of is a large garage and inside the garage is a small office?

A Right, a little office to the righthand side.

Q Now, were you working in that office?

A Yes, I was.

Q And was that office you were working in separated by glass or any partitions from the rest of the garage?

A There's a window right there, you can look out through the window to the garage.

Q About how large a window in the office?

A Thirty-six inches by four foot in height.

[151] Q What type of work was this defendant employed to do for you?

A He was a helper on a truck.

Q A helper on a truck?

A Yes.

Q On September 15th, what were his regular hours of work?

A Normally between eight and five, unless there is an emergency, and then they work overtime.

Q Was there an emergency there that day, do you recall?

A No, we just happened to be in the shop, doing a little of this, a little of that, back and forth.

Q Were you in the office all day, or did you arrive there at a certain time?

A I was there a good part of the day, I would say.

Q So that do you recall being there let's say at 5 o'clock?

A I was there from 5 o'clock on, to closing.

Q You were there from 5 o'clock on?

A That's correct.

Q What type of work were you doing in the office once you arrived there at 5 o'clock?

A Normally it's on the 'phone, speaking on the 'phone. [152] Q Now, when you say you are on the 'phone, are you continuously on the 'phone?

A Talking to different customers, oil companies. We work with oil companies, Paragon, so forth.

Q Were you the only person working in the office?

A Myself, and there's another gentleman there who does typing, whatnot. Normally he went home 6 o'clock at night, normally.

Q Once you got into the office around 5 o'clock, did you have any occasion to go outside of that office, that you were working in?

A Occasions, off and on, I was in and out.

Q Can you remember at this point exactly when you left, how long you were out of it, and so forth?

A The exact time, I couldn't give, because you are on the 'phones, out of the office, in the office, you know, you are back and forth.

Q When you say you are on the 'phone, is it safe to say, to assume that you are continuously on the 'phones once you get into that office?

A Yes—well, it's hard to answer that, too, properly, because it's yes and no, your Honor. You're on the 'phone, and something will be going on in the garage and you walk out to see what's going on, and then [153] back on the 'phone.

Q You recall this past Friday, when I came to your office with the detective?

A On that day I was married to the telephone.

Q And you were on the telephone when I spoke to you?

A That's right.

Q As a matter of fact, you had two telephones going at one time?

A That's correct.

Q Did you have one or two telephones going at the Campbell office?

A Yes, we had two 'phones going.

Q You had two 'phones. And at times would you be on two 'phones at once, as you were this past Friday?

A Yes, there's occasions.

Q So that you are very busy with your 'phone work in your work in the office. Is that correct?

A That's correct.

Q Now, how many employees did you have working for you at this Campbell Avenue address on the afternoon of September 15, 1971?

A Again, I didn't check—well, I'd say approximately, [154] there was four fellows on that particular day working for us.

Q How many?

A Four.

Q At around five or six or seven p.m. approximately how many people did you have working in the garage?

A There was at least two or three fellows outside. This is why I say it's hard to—

Q Are some working in the garage and some working outside the garage?

A That's correct.

Q As a matter of fact, outside the garage there is a yard. Is there not?

A Yes.

Q Do you store equipment in that yard?

A Yes.

Q Was equipment being parked and stored at the yard on September 15, 1971 in the yard?

A At the time—I believe they were working in the yard.

Q So that whoever was there at the place might have been inside the garage, and might have been outside the garage. Is that correct?

[155] A That's right.

Q And is this correct say 5 o'clock, or 6 o'clock or 7 o'clock as well?

A More or less, because they are in and out. It's a type of thing where they are in the shop and then out in the yard itself, working or unloading a truck, whatever.

Q So that the people you have working there in that garage on the late afternoon or early evening of September 15, 1971, while you are on the 'phone, you don't have them all under your constant observation all the time now, do you?

A Of course not.

Q Are there lengthy periods of time during the course of which you might not have all of them under your observation?

MR. ADAMS: Judge, may I object to "lengthy periods of time" in that question, Judge?

THE COURT: I will sustain the objection, as to form.

BY MR. GIACOBBE:

Q Are there periods of time when some of them are not—when you don't see them, in other words?

A Of course. If there wasn't, I wouldn't need them [156] there.

Q When you are on the telephone talking to customers and other people, you are not watching the people in the shop. Is that correct?

A Not all the times.

MR. ADAMS: Objection, Judge.

THE COURT: Objection sustained.

BY MR. GIACOBBE:

Q So that can you recall specifically what time this defendant, Herring, arrived there and what time he stayed and what time he left?

A Specifically, I couldn't be honest with you. I'd say in the areas of 5:30, 6 o'clock, I had seen Cliff there.

Q And when you say between 5:30 and 6 o'clock, you had seen him, based on what you told us so far,

is it safe to say that during some of that period of time he might have been out of the garage and he might have been in the garage?

A It's possible, he could have walked out into the yard to speak to somebody else.

Q And if he did leave the garage, you wouldn't know for how long a period of time he was gone. Is that correct?

[157] A Not really. I never followed him around, you know, but I know he was on the premise, also he was there later on, also.

Q Now, on the night of September 15, 1971, when was it when you learned that the defendant Herring had been arrested?

A I believe around 10 o'clock, 10:30. He called me at home.

Q That was the first time you learned about it?

A That was the first time I learned about it, yes, sir.

Q Do you recall specifically and definitely what time it was when he left your place of business that night?

A That particular night I do, because we were sitting outside talking, and—it was about 9:30, 10 o'clock—no, it couldn't have been. About 9 o'clock, 9:30 I would say, because I just went home and I got the call maybe an hour later when he was arrested.

MR. GIACOBBE: Thank you very much. No further questions.

MR. ADAMS: Just one second, please.

THE WITNESS: Sure.

(Mr. Adams confers with defendant.)

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[158] (2:23 p.m.)

REDIRECT EXAMINATION

BY MR. ADAMS:

Q Mr. Taylor, do you remember whether that was the night that you and Clifford Herring had picked up

a refrigerator and were working in your place on the refrigerator that night?

A I don't remember offhand. It's not fair to be able to answer one way or the other, to be honest with you.

Q What is that?

A I don't remember offhand, that particular night, you know.

THE COURT: Did Mr. Herring get paid that night?

THE WITNESS: No.

MR. ADAMS: I am sorry,, Judge, I didn't hear that.

THE COURT: I asked him if Mr. Herring got paid that night, his answer is no.

MR. ADAMS: All right, Judge.

(2:24 p.m.)

RECROSS-EXAMINATION

BY MR. GIACOBBE:

Q Do you recall what day of the week this was?

A Offhand I couldn't tell you.

Q What day of the week was pay day?

A Fridays.

[159] Q Every Friday?

A Every Friday.

MR. GIACOBBE: Thank you.

THE COURT: You may step down.

(Witness Taylor excused.)

MR. ADAMS: May I continue, Judge?

THE COURT: Yes.

CLIFFORD HERRING, defendant herein, called as a witness in and for his own behalf, after first being duly sworn, testified as follows:

(The witness states he resides at 125 Cassiday Place, Staten Island, New York.)

(2:25 p.m.)

DIRECT EXAMINATION

BY MR. ADAMS:

Q Mr. Herring, can I take you back now to September 15, 1971? Do you recall that date?
A Yes, I do.
Q Would you speak loud, please?
A Yes, I do.
Q Now, did something happen to you, were you apprehended on September 15, 1971?
A Yes, I was.
Q About what time?
A Somewhere about 7:30, 8 o'clock, somewhere around [160] there.
Q Where were you apprehended?
A At the corner of Broadway and Market Street.
Q I see. Were you apprehended by Officer Stubbs?
A Yes, I was.
Q And you heard Officer Stubbs testify. Is that correct?
A Yes, I did.
Q Now, on September 15, 1971 were you over at this 116 Campbell Avenue?
A Yes, I was.
Q With Mr. Donald Taylor who preceded you as a witness. Is that correct?
A Yes, I was.
Q Now, when you were approached by Officer Stubbs on September 15, 1971, did you tell him that you were working that night?
A Yes, I did.
Q And were you then taken to the 120 precinct?
A At the time of my arrest?
Q Yes.
A No, I was taken into the project across the street.
Q And then were you taken to the 120 precinct?
A Yes, I was.
[161] Q Did Mr. Taylor come down that evening pursuant to a telephone call?

A Yes, he did.
Q Did you see him there that evening?
A I didn't see him there, but I understand he was there.
Q Did you see him in court the following day, on September 16, 1971?
A Yes, I did.
Q Now, will you tell this Court what you were doing on September 15, 1971 at 6 p.m. and prior thereto?
A Before six?
Q Yes.
A We were working on a refrigerator that we went up and picked up.
Q Please, a little louder, Mr. Herring.
A We were working on a refrigerator, and cleaning up the shop.
Q Where had you picked up the refrigerator?
A From the corner candy store of Castleton Avenue and Broadway.
Q Who was with you?
A Donald Taylor.
[162] Q That was the witness that preceded you on the stand?
A Yes, and one of the other workers.
Q Where did you go from there?
A Back to the shop.
Q And approximately what time did you get there?
A To the shop?
Q Yes, if you know.
A It was about 3:30.
Q Now, at 6 p.m. on September 15, 1971 were you in the shop?
A Yes, I was.
Q Were you there 5:30?
A Yes, I was.
Q Were you there at 6:30?
A Yes, I was.
Q And were you there at 6 p.m.?
A Yes, I was.
Q Now, did you hear Mr. Braxton relate that you pointed a blade, or a knife at him, he didn't know which

one, but did you hear him say that you approached him and asked him for some money on September 15, 1971, around 6 p.m.? Is that correct?

A Yes, I did.

[163] Q Did you?

A Yes, I heard him.

Q Did you approach him that night?

A No, I didn't see him.

Q When was the first time you saw him on September 15th?

A When Officer Stubbs had apprehended me and took me in the projects, where he had a knife, in the projects.

Q Now, do you know the witness Braxton that testified here?

A Yes.

Q Do you know his father?

A Yes.

Q Have you ever lived near him?

A Have I ever lived near him?

Q Yes.

A Yes.

Q Where?

A Nine Markham Drive.

Q How long did you live at 9 Markham Drive?

A I stayed with my family there for a few months. They continued to live there for quite a while, over a period of years.

Q Did you know Braxton for a number of years [164] before September 15, 1971?

A I knew him as a small boy.

Q I see. Now, did Braxton ever ask you for any money at any time prior to September 15, 1971?

A Occasionally.

Q When I say prior, I am talking about before September 15, 1971.

A Occasionally.

Q What did he ask you money for?

A Different things, get wine, sometime he wanted drugs.

Q And what did you tell him?

A I told him I'm working, why couldn't he go to work, and get his, too.

Q Were there ever any words between you and Braxton?

A Except that any time he was refused, you know, I was called a name, something of that sort, I'll fix you, you know.

Q What is that?

A I would be called a name, or he'd say, I'll fix you, something like that.

Q He would say that to you?

A Yes.

---

[165] CROSS-EXAMINATION

(2:30 p.m.)

BY MR. GIACOBBE:

Q This Campbell Avenue garage where you worked, was the street at the end of Campbell Avenue, was that Wayne Street?

A That is.

Q And you know where Markham Drive is. Right?

A Yes, I do.

Q How far is Markham Drive from Wayne Street?

A I guess about three city blocks.

Q It's in the project. Is that correct?

A That's correct.

Q And you have walked from Wayne Street and Campbell Avenue to Markham Drive, haven't you?

A Have I walked from Campbell Avenue to Wayne Street?

Q Yes, to where Braxton lives.

A To where Braxton lives?

Q Right.

A I've walked past there.

Q How long does it take you to walk from Campbell Avenue and Wayne Street to where Braxton lives, if you are walking?

A That depends on the pace you are walking.

Q Suppose it was a medium pace.

A Maybe a little over ten minutes.
[166] Q Suppose it was a fast pace?
A That depends on how fast.
Q I see. But less than ten minutes, I guess, is it fair to say?
A Probably.
Q Now, how long did you know Braxton before September 15, 1971?
A I can't count the years. I was in Korea with his father, so I know him as a boy.
Q On September 15, 1971 you knew that Allen Braxton previously had been on drugs at one time or another. Right? Did you know that?
A Prior to that?
Q Yes.
A Yes, I did.
Q As a matter of fact, you yourself had used heroin before that. Is that correct?
A At one time.
Q Were you using heroin on September 15, 1971?
A No, I was not.
Q How much a week did you take home from this job that you had in September of 1971, what was your weekly take-home pay?
A That depended on how many days you worked, or how [167] many hours I put in.
Q The Friday before September 15, 1971, the payday before, what was your take-home pay? Do you remember?
A I couldn't tell you.
Q Now, on September 15, 1971 did you see Allen Braxton at anytime before 6 o'clock?
A What was that now?
Q On September 15, 1971 did you see Allen Braxton any time before 6 o'clock?
A No, I did not.
Q Isn't it a fact in the late afternoon of September 15, 1971, at approximately 5 o'clock, you tried to rob money from Allen Braxton in the Broadway area of Staten Island?
A No, it's not.

MR. ADAMS: Judge, I object. Sorry, there was no statement about that by Allen Braxton. The crime is 6 o'clock, Judge.

MR. GIACOBBE: This is a different incident I am questioning about, Judge.

THE COURT: Overruled.

BY MR. GIACOBBE:

Q What was your answer to that?

[168] A I said no.

Q You didn't approach him about 5 o'clock and ask him for money?

A I didn't seen Allen Braxton.

Q Now, what time was it when you say the housing authority policeman arrested you? You say it was 7:30 to 8 o'clock?

A I'd say approximately, around that time.

Q Did you hear your employer before testify that you didn't leave work that night until 9 o'clock?

A It could have been 9 o'clock.

Q Well, what do you mean it could have been? Were you arrested at 7:30, 8 o'clock or later?

A It was dark, it was late, and I don't remember the exact time.

Q How far from work were you when you were arrested?

A How far?

Q Yes.

A I was at Broadway and Market Street, which you spoke of, that you know the area, so you know just about how far I was away.

Q You tell us, how many blocks from your place of work were you when you were arrested?

[169] A How many blocks away from work?

Q Yes, that is the question.

A I'd say four city blocks away.

Q Well, when you were arrested, had you already left work for the night, or were you just away for a little while, planning to go back to work?

A I was away for the night. The boss had left, locked up and took me and dropped me off.

Q Now, Mr. Herring, on November 13, 1971 did you steal $20 from—

MR. ADAMS: Objected to, Judge, objected to.

THE COURT: Overruled.

BY MR. GIACOBBE:

Q Did you steal $20 from Willy Smith on Henderson Avenue, Richmond County, by force?

MR. ADAMS: Objected to, Judge.

A No, I did not.

MR. ADAMS: Judge, this is not proper examination.

THE COURT: I think it is.

MR. ADAMS: Judge, may I remind the Court that you did not permit me to ask the same questions of Allen Braxton?

THE COURT: This is a little different. It [170] wasn't the same question.

MR. ADAMS: Exception, please.

THE COURT: Your question was whether he was arrested.

MR. ADAMS: All right, Judge.

THE COURT: You may proceed.

MR. ADAMS: May I have an exception to all this?

THE COURT: Noted.

BY MR. GIACOBBE:

Q On September 10, 1970, Mr. Herring, were you convicted in this court of the crime of petit larceny?

A When was this now?

Q September 10, 1970, were you convicted of the crime of petit larceny?

MR. ADAMS: Judge, I will consent, Judge, that this—

MR. GIACOBBE: Judge—

MR. ADAMS: One second, please, Mr. Giacobbe. I can make a statement and then you can object to it.

MR. GIACOBBE: Thank you.

MR. ADAMS: You are welcome, sir. Judge, I will consent to the fact that Mr. Herring has a record of probably two misdemeanors.

[171] MR. GIACOBBE: Judge, I am not testing his credibility.

THE COURT: All right, Mr. Giacobbe.

MR. ADAMS: Exception—objected to, Judge.

THE COURT: Overruled.

BY MR. GIACOBBE:

Q What was your answer?

A My answer was, was I convicted by force, yes.

Q That is in connection with theft of $10 by Linda Thompson?

A Was I convicted? Self convicted.

Q You pleaded guilty?

A Yes.

Q And also on September 10, 1970 were you convicted of a separate crime of petit larceny in connection with the theft of $25 from a Robert Horvath?

A Under the same conditions, yes.

Q You pleaded guilty to that?

A Under the same conditions, yes.

Q And then on or about March 20, 1970 were you convicted of the possession of a hypodermic instrument; that is, conviction at the hands of a jury, were you?

[172] A Yes.

MR. GIACOBBE: I have no further questions. I am sorry, Judge, one more question.

BY MR. GIACOBBE:

Q On November 20, 1964 were you convicted of the crime of unlawful entry in the criminal court, Richmond County?

A When was this?

Q November 20, 1964.

A I don't remember.

MR. GIACOBBE: Thank you. No further questions.

(2:38 p.m.)

REDIRECT EXAMINATION

BY MR. ADAMS:

Q Mr. Herring, I heard, in cross-examination, you mention the word "Korea." Were you in Korea?

A Yes, I was.

Q What were you doing there?

A I was in the army.

MR. GIACOBBE: Judge, objection, unless he was in Korea on September 15, 1971, I submit that is totally irrelevant.

THE COURT: I will take it. You may answer the question.

A Yes, I was, I was in the United States Army.

[173] Q How long were you in the army?

A I was in the army from about '51 to '55. '51 to '55.

Q Were you given an honorable discharge?

A Yes, I was.

MR. ADAMS: Nothing further, your Honor.

THE COURT: You may step down.

(At 2:39 p.m. defendant-witness is excused.)

THE COURT: Is that the defendant's case?

MR. ADAMS: One moment, please, Judge.

(Mr. Adams confers with defendant.)

MR. ADAMS: Defendant rests, Judge.

MR. GIACOBBE: People rest, your Honor.

THE COURT: Before hearing the motions, the Court will reverse a ruling made earlier in the trial in which it overruled an objection of the People to testimony of the witness Stubbs, which called for a hearsay answer, and sustain the objection on the grounds it was hearsay. I will hear your motions.

MR. ADAMS: Can I be heard on that, Judge?

THE COURT: You certainly may.

MR. ADAMS: On that particular reversal of the [174] Court's ruling.

THE COURT: You may.

MR. ADAMS: Judge, Officer Stubbs testified about what this particular individual, who is here today, tes-

tified, Judge. He came and approached the defendant and testified, and said to him, "Clifford, there is some trouble, you have been accused of something." And he takes him some place, and allegedly he testifies that Clifford Herring says to him, "I was some place." So he calls up and checks on that. And I believe, Judge, it's not hearsay, it is part of the investigation, it is part of res gestae, and it is part of the officer's duty, and I submit to the Court that reversal of the Court's ruling, I respectfully submit, is wrong.

THE COURT: Your objection is noted.

MR. ADAMS: Exception, please.

THE COURT: Exception is noted. I will hear your motions. This is not in summation, I will not permit summation, but I will hear your motions.

MR. ADAMS: I didn't hear the last part, Judge.

THE COURT: I said I will not permit summation, but I will hear your motions.

[175] MOTIONS IN BEHALF OF DEFENDANT AT END OF DEFENDANT'S CASE

(2:41 p.m.)

MR. ADAMS: Judge, at this time I respectfully move to—make two motions, Judge. Firstly, that the Court dismiss the two counts, first count and the second count of the indictment on the grounds the People have failed to make out a prima facie case; and on the further grounds the People have failed to prove the defendant guilty of each and every part and parcel of the crimes charged in count one and count two beyond a reasonable doubt as a matter of law, and as a matter of fact.

THE COURT: Motion denied. I will take a short recess to deliberate, and I will give you a verdict.

MR. ADAMS: Well, can I be heard somewhat on the facts?

THE COURT: Under the new statute, summation is discretionary, and I choose not to hear summations.

THE CLERK: Remand.

(At 2:42 defendant is remanded; trial is recessed pending Court's determination after [176] deliberation.)

(At 2:50 p.m. defendant is present at counsel table with Mr. Adams.)

THE CLERK: Case on trial, indictment 311/1971, People against Clifford Herring; People by Mr. Giacobbe, defendant by Mr. Adams. Defendant is present with counsel. Are both sides ready to proceed?

MR. GIACOBBE: People are ready, your Honor.

MR. ADAMS: Ready, sir.

THE COURT: I am prepared to render a verdict.

THE CLERK: Will the defendant please stand.

(Defendant complies with request.)

VERDICT

THE COURT: The verdict of the Court on count one is, the Court finds the defendant not guilty.

On Count two, which charges the defendant with attempted robbery in the third degree, the verdict of the Court is guilty.

The third count was dismissed.

I will hear your motions.

MR. ADAMS: Yes, Judge. At this time, Judge, I respectfully except to the findings of the Court on the second count of the indictment, and respectfully have an [177] exception thereto.

THE COURT: All right. Do you have any other motions?

MR. ADAMS: Just to set aside the verdict as against the weight of the evidence, usual motions, statutory, Judge. And I have to assume the Court will deny them.

THE COURT: Motion denied.

MR. ADAMS: With an exception, please.

THE COURT: Right. Defendant is remanded. Do you waive fixation of specific date for sentence?

MR. ADAMS: Yes, Judge.

THE CLERK: Remand.

(Defendant is remanded.)

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

IRWIN GOLDSTEIN
Official Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND—CRIMINAL TERM

PART I

Ind. No. 311/1971
(12322)

Att. robbery 3rd deg.

SENTENCE

PEOPLE OF THE STATE OF NEW YORK,

—against—

CLIFFORD HERRING, DEFENDANT.

County Courthouse
Staten Island, N.Y.
Thursday, June 15, 1972
10:09 a.m.

BEFORE:

HONORABLE THEODORE G. BARLOW
Justice of the Supreme Court

APPEARANCES:

JOHN M. BRAISTED, JR., ESQ., District Attorney
Appearing for the People

By: PHILLIP G. MINARDO, ESQ., ADA, of Counsel

SEYMOURE ADAMS, ESQ.
Appearing for the Defendant

---

[179] THE CLERK: Indictment number 311/1971, People versus Clifford Herring, by Seymoure Adams.

(Defendant and counsel stand before the bar.)

MR. ADAMS: Good morning, sir.
THE COURT: Good morning, Mr. Adams.
THE CLERK: Is the defendant ready for sentence?
MR. ADAMS: Yes, sir.
THE CLERK: The People have any recommendations as to sentence?
MR. MINARDO: Your Honor, this defendant was convicted at the trial. He is no stranger to the Court. He has a long extensive criminal record. We recommend the Court impose the maximum sentence under the conviction.
MR. ADAMS: Judge, may I be heard on that, please?
THE COURT: You may.
MR. ADAMS: Judge, in this particular matter, defendant was indicted. There were three counts of the indictment. May I remind the Court, although at this moment we are bound by the decision, where he was found guilty of one count, which is not the most serious count of the indictment, Judge. There are sharp issues of fact here, Judge, and I respectfully [180] request the Court be as lenient as possible under the circumstances.
THE COURT: Mr. Herring, do you wish to be heard in your own behalf?
THE DEFENDANT: I haven't anything to say.
THE COURT: Clifford Herring, it is the judgment of this Court that you be sentenced to the New York State Department of Correction for indeterminate term not to exceed four years. This sentence is to run concurrent with any sentence you receive under indictment number 1/1972.
MR. ADAMS: Judge, may I put on the record I have advised the defendant of his right to appeal, and he will file the notice of appeal himself? In fact, I have advised him that I think he should appeal. Thank you, sir.
THE COURT: All right.

(Defendant's rights to appeal form filed with the Court Clerk upon execution thereof, defendant retaining copy of same.)

THE CLERK: Remand.

(Defendant is remanded.)

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

[181] At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 24, 1973.

HON. JAMES D. HOPKINS,
Acting Presiding Justice

HON. FRED J. MUNDER
HON. M. HENRY MARTUSCELLO
HON. FRANK A. GULOTTA
HON. ARTHUR D. BRENNAN
Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

CLIFFORD HERRING, APPELLANT

ORDER ON APPEAL FROM JUDGMENT OF CONVICTION

In the above entitled action, the above named Clifford Herring, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Richmond County, rendered June 15, 1972; and the said appeal having been argued by Diana A. Steele, Esq., of counsel for the appellant, and argued by Norman C. Morse, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

[182] STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. HAROLD A. STEVENS, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

CLIFFORD HERRING

CERTIFICATE DENYING LEAVE

I, HAROLD A. STEVENS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
January 31, 1974

/s/ Harold A. Stevens
Associate Judge

* Description of Order:

[183] At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 22, 1974.

HON. FRANK A. GULOTTA
Presiding Justice

HON. JAMES D. HOPKINS
HON. M. HENRY MARTUSCELLO
HON. ARTHUR D. BRENNAN
HON. FRED J. MUNDER
Associate Justices

THE PEOPLE, ETC., RESPONDENT

v.

CLIFFORD HERRING, APPELLANT

ORDER

In the above entitled cause, the above named Clifford Herring, defendant, having appealed to this court from a judgment of The Supreme Court, Richmond County, rendered June 15, 1974; and this court, by order dated December 24, 1973, having unanimously affirmed the judgment; and the appellant having moved to amend the remittitur of December 24, 1973, so as to state therein that constitutional questions were presented, namely, whether he was deprived of his rights under the Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States;

Now, upon the papers filed in support of the motion and there being no opposition thereto, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby granted to the following extent: decision and order of this court dated December 24, 1973 amended by adding thereto the following:

Upon the appeal herein, there was presented and passed upon the following constitutional question, namely, whether relator's rights under the Fourth, Sixth and Fourteenth Amendments were denied by the trial court's application of paragraph (c) of subdivision 3 of CPL 320.20 to refuse appellant permission to deliver a summation. This court considered appellant's said conviction and determined that none of his constitutional rights were violated.

Enter:

IRVING N. SELKIN
Clerk of Appellate Division

SUPREME COURT OF THE UNITED STATES

No. 73-6587

CLIFFORD HERRING, APPELLANT

v.

NEW YORK

APPEAL from the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

The statement of jurisdiction in this case having been considered by the Court, probable jurisdiction is noted.

October 21, 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 563723 68

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

v.

NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF
THE SUPREME COURT OF THE STATE OF
NEW YORK, SECOND DEPARTMENT

BRIEF FOR APPELLANT

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Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

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No. 73-6587

CLIFFORD HERRING,

Appellant,

v.

NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

BRIEF FOR APPELLANT

OPINION BELOW

The affirmance by the Appellate Division, Second Department was without opinion and is reported at 43 A.D. 2d 816. The order of affirmance appears in the printed appendix at page 98. On March 22, 1974, the Appellate Division amended its remittitur to certify that a constitutional question had been passed upon. This order appears in the printed appendix at page 100. Leave to appeal to the Court of Appeals was denied on

January 31, 1974, by Associate Judge Harold Stevens. The certificate denying leave to appeal to the Court of Appeals appears in the printed appendix at page 99. No opinions have been rendered.

JURISDICTION

The judgment and order of the Appellate Division was entered on December 24, 1973. Leave to appeal to the Court of Appeals was denied on January 31, 1974. Notice of appeal was filed in the Supreme Court of the State of New York, Richmond County, the court possessed of the record, on April 8, 1974. The appeal was docketed on April 18, 1974 and probable jurisdiction was noted by the Court on October 21, 1974. The jurisdiction of the Court is invoked pursuant to Title 28 of the United States Code, Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI

* * *

United States Constitution, Amendment XIV, Section 1

* * *

New York Criminal Procedure Law, Section 320.20(3):

Non-jury trial, nature and conduct thereof.

3. The order of the trial must be as follows:

(a) The court may in its discretion permit the parties to deliver opening addresses. If the court

grants such permission to one party it must grant it to the other also. If both parties deliver opening addresses, the people's address must be delivered first.

(b) The order in which evidence must or may be offered by the respective parties is the same as that applicable to a jury trial of an indictment as prescribed in subdivisions five, six and seven of Section 260.30.

(c) The court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first.

(d) The court must then consider the case and render a verdict.

QUESTION PRESENTED

Whether Section 320.20(3)(c) of the New York Criminal Procedure Law, which authorizes a trial judge to prohibit closing argument in a non-jury trial is, on its face and as applied, violative of the Due Process Clause of the Fourteenth Amendment and the right to counsel provision of the Sixth Amendment.

STATEMENT OF THE CASE

Charged with attempted robbery in the first and third degrees and possession of a dangerous instrument,[1] appellant waived his right to a jury trial pursuant to Section 320.10 of the New York Criminal Procedure

[1] New York Penal Law §§ 110.00/160.15; 110.00/160.05; 265.05.

Law and on February 3, 4 and 7, 1972, was tried before a justice of the New York Supreme Court.

The People's Case

On February 3, 1972, the testimony of Allen Braxton, the complaining witness, was taken. Braxton testified that on September 15, 1971, at about 6:00 p.m., he was outside his home, a housing project on Staten Island, transferring some money from his pants pocket to his wallet when appellant approached him (App. 5, 6, 9, 15).[2] Appellant, whom he recognized from the neighborhood, said in a soft voice "[p]lease give me some money, I am sick" (App. 7, 18, 35). When Braxton refused, appellant took a knifeblade out of his right pocket and flicked his right wrist at Braxton, whereupon Braxton ran into his building (App. 6, 19). The entire encounter lasted approximately thirty seconds (App. 26).

Braxton immediately reported the incident to William Stubbs, a family friend and New York City Housing Authority Policeman (App. 9, 11, 24).

Following Braxton's testimony, the case was adjourned until the following morning, February 4, 1972, at which time William Stubbs testified. Stubbs, who had been dismissed from the police force some time after the incident in question, stated that he had known both Braxton and appellant before the date of the alleged incident but did not witness it himself (App. 51, 58). Rather, he learned of it from Braxton at about 6:00 p.m. on the evening of September 15, 1971. About an hour and a half later, while patrolling the area, he came upon Braxton and appellant standing on opposite sides

[2] Numerical references preceded by "App." are to the printed appendix.

of one of the neighborhood streets (App. 52-54). When Stubbs approached appellant and notified him of Braxton's accusation, appellant immediately denied having attempted to rob Braxton and told Stubbs that he had been working for a Mr. Taylor at the time Braxton claimed appellant had tried to rob him (App. 54, 60). Stubbs placed appellant under arrest and found a small knife blade on appellant's person (App. 54, 55).[3]

The People then rested and the case was adjourned over the weekend (App. 65, 68).

The Defense

On Monday morning, February 7, 1972, appellant's case was recessed until the afternoon to accommodate the schedule of his employer, Donald Taylor (App. 71). At about two o'clock that afternoon, the case was recalled and Mr. Taylor, the president of A & A Tank Cleaning Company on Staten Island, testified that on September 15, 1972, appellant was at work at 6:00 p.m. (App. 71, 73). Although unable to swear to the exact time he had seen appellant on his premises that day, Taylor did remember seeing him there at about 5:30 or 6:00 p.m. as well as later than 6:00 p.m. (App. 156, 157). He also remembered talking to appellant sometime during the evening and before he left for home at about 9:00 or 9:30 p.m. (App. 81). Less than an hour later, appellant called him at home and said he had been arrested (App. 81).

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[3] At the end of the People's case, the court dismissed the charge of possession of a dangerous instrument on the grounds that the blade was too small to fall within the purview of Penal Law §265.05 (App. 66).

Appellant also took the stand and denied attempting to rob Braxton. He stated that he had been at work until at least 6:30 p.m., and pointed out that the shop was some ten minutes away from Braxton's home (App. 84-87). Appellant further testified that he had previously been Braxton's next door neighbor and that on occasion Braxton had asked him for money for drugs[4] or wine. Indeed, each time appellant refused, Braxton called him a name or threatened to "fix" him (App. 85-86).

The Verdict

After both sides had rested and a motion to dismiss the charges was denied, defense counsel requested an opportunity to make a closing argument, stating: "Well, can I be heard somewhat on the facts?" The court, relying specifically on the statute involved herein denied his request, replying: "Under the new statute, summation is discretionary, and I choose not to hear summations" (App. 92).

Eight minutes later, the court found appellant guilty of attempted robbery in the third degree (App. 93). On June 15, 1972, appellant was sentenced to an indeterminate term of imprisonment with a maximum of four years (App. 96).

The Appellate Division, Second Department, affirmed the conviction without opinion on December 24, 1973 (App. 98). Leave to appeal to the Court of Appeals was denied on January 31, 1974 (App. 99).

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[4] Both appellant and Braxton admitted that they had used narcotics (App. 41, 87).

SUMMARY OF ARGUMENT

I.

Section 320.20(3)(c) of New York's Criminal Procedure Law, which authorizes the court in a non-jury trial to preclude closing argument, deprives a defendant of his constitutional rights to be heard in his own defense and to the effective assistance of counsel.

The right of a criminal defendant to be heard in his own defense is inextricably entwined with his right to the "guiding hand of counsel" at all critical stages of the criminal process. The Court's decisions in *Brooks v. Tennessee*, 406 U.S. 605 (1972) and *Ferguson v. Georgia*, 365 U.S. 570 (1961) establish that the professional skill of a trained advocate is essential to the effective planning of a defense and to the presentation in organized, coherent and logical fashion, of the factual and legal side of a defendant's case and that statutes which abridge counsel's basic role will not pass constitutional muster.

Like the statutes struck down in *Brooks* and *Ferguson*, section 320.20(3)(c) is unconstitutional because it sanctions the denial of a defendant's right to the benefit of counsel's skill in sifting, organizing and presenting to the fact finder the strengths of his case and the weaknesses of the prosecution's evidence. It thus deprives an accused of the "guiding hand of counsel" at the critical fact-finding stage of the trial process.

The statute is also at odds with the historical development of closing argument within our adversary

system. Indeed, it runs counter to the overwhelming weight of authority.

II.

Closing argument, whether to a judge or jury, diminishes the possibility of error in the fact-finding process. While a judge has legal expertise, he does not differ from a juror in his attentiveness or ability to remember salient facts. The possibility of error may be even greater in a bench trial because the jury's judgment, being collective, at least furnishes some assurance of reliability. Where a judge sits alone, without the benefit of summation, the issue of guilt or innocence is relegated to the subjective impression which he alone has garnered from the trial. In our over-worked urban courts, preclusion of closing argument is especially threatening to the reliability of our trial process. For in those courts, there is an exacerbation of the risk that a verdict may result from boredom, cynicism or time pressure, rather than from a fair evaluation of the evidence.

The facts of this case underscore the importance of closing argument in the non-jury trial. Testimony from four witnesses was taken over a period of five days, broken up by the weekend. One of the two prosecution witnesses did not witness the alleged incident and the other, the complainant, was charged by appellant with having a motive to be vindictive. Appellant interposed an alibi, corroborated by his employer, that he was at work at the time in question. Absent summation, there was no guarantee that the

trial judge weighed the crucial aspects of the case with his attention drawn to the weaknesses of the prosecution's evidence and the strengths of appellant's defense. The refusal to hear counsel thus stripped appellant of his right to have his attorney utilize his professional skills in presenting his case in its strongest posture for consideration by the court. It thereby diluted substantially his rights to be heard and to the effective assistance of counsel.

ARGUMENT

POINT I

SECTION 320.20(3)(c) OF THE NEW YORK CRIMINAL PROCEDURE LAW, WHICH AUTHORIZES A TRIAL JUDGE TO PROHIBIT CLOSING ARGUMENT IN A NON-JURY TRIAL IS, ON ITS FACE AND AS APPLIED, VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE RIGHT TO COUNSEL PROVISION OF THE SIXTH AMENDMENT.

I.

Section 320.20(3) (c) of New York's recently enacted Criminal Procedure Law[5] authorizes the judge in a

[5] N.Y.C.P.L. § 320.20 became effective on September 1, 1971 along with the entire Criminal Procedure Law. Prior to that date, no statute governed the procedure of the non-jury trial.

non-jury trial to dispense with closing argument. Invoking this statute, the trial court denied counsel's request to deliver a summation and thereby deprived appellant of his due process right to be heard as well as his right to the effective assistance of counsel.

It is basic to our adversary system of criminal justice that a defendant has a right to be heard on his own behalf and that such right is inseparable from his right to be heard by counsel at every critical stage of the criminal process.[6] Since *Powell v. Alabama*, 287 U.S. 45 (1932), wherever representation by counsel has been ordained by the Court, it has been accompanied by the recognition that counsel's presence alone does not necessarily guarantee the fairness required by the Constitution. Rather, in the now classic words of Mr. Justice Sutherland, an accused

> requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed and appearing for him, it reasonably may not be doubted that such refusal would be a denial of a hearing and therefore of due process in the constitutional sense. 287 U.S. at 69.

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[6] Thus, since *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court has held that a defendant is entitled to counsel at a trial for any crime punishable by imprisonment [*Argersinger v. Hamlin*, 407 U.S. 25 (1972)]; at a preliminary hearing [*Coleman v. Alabama*, 399 U.S. 1 (1970)]; at sentence [*Mempa v. Rhay*, 389 U.S. 128 (1967)]; at a guilty plea [*White v. Maryland*, 373 U.S. 559 (1963)]; and on appeal taken as a matter of right [*Douglas v. California*, 372 U.S. 353 (1963)].

Relying on *Powell*, the Court has twice held state statutes which interfered with a defendant's right to the benefit of certain of counsel's professional functions during trial to be deprivations of the "guiding hand of counsel". *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

Brooks, which struck down a statute that required a criminal defendant to be the first defense witness or lose his right to testify, established that a defendant's right to have his attorney plan and order the presentation of such a critical aspect of his defense is guaranteed by the Due Process Clause. 406 U.S. at 612, 613. New York's statute, which permits a court to foreclose closing argument, is at odds with *Brooks'* sensitivity to the substantive meaning of the "guiding hand" concept enunciated in *Powell* because it, too, abridges defense counsel's control over a critical aspect of the defense–namely, his statement to the court of the very theory of the defense, presented cogently by virtue of his training, to convince the court to acquit his client.

Ferguson is even more compelling, for the Court there underscored the critical nature of an advocate's role in presenting factual data favorable to the defense to the fact-finder in an ordered, coherent and complete fashion. In striking down the Georgia statute which precluded counsel from eliciting the defendant's unsworn statement to the jury, the Court held that without counsel's "guiding hand" in the elicitation of that statement, relevant and critical facts might not be presented or might be presented incoherently or in a confused manner at best. 365 U.S. at 591, 595 and 596.

Section 320.20(3) (c) conflicts with *Ferguson* in that it sanctions a verdict based only on the judge's subjective view of the disjointed and unordered segments of the trial evidence. It thus deprives the accused of his basic right to have his defense presented to the finder of fact by a skillful advocate trained to articulate his side of the case in a coherent, organized and complete argument, with due emphasis on the factual and legal strengths of the defense case and the weaknesses of the prosecution's evidence. In a very real sense, the statute deprives a defendant of the "guiding hand of counsel" at no less a critical stage of the proceeding than did the *Ferguson* statute. In *Ferguson*, counsel's "guiding hand" was excised at the fact elicitation stage of the trial. Here, it is excised at the very threshold of the fact-finding stage. In constitutional terms, this is a distinction without a difference and *Ferguson* should be dispositive.

If *Ferguson* is not entirely dispositive, it surely points the way to a result consistent not only with constitutional doctrine but with the historical development of the importance of closing argument within our adversary system.[7] For historically, it was

[7]While the English common law has little bearing on the historical development of the right to closing argument in this country, since a defendant charged with a felony in England was prohibited from appearing with counsel until 1836, it is nonetheless significant that in 1865, the right to deliver a closing argument was statutorily recognized. The Criminal Procedure Act of 1865 included the following provision: "Upon every trial . . . whether the prisoners . . . or any of them shall be defended by counsel or not . . . such prisoner or their counsel shall be entitled . . . when all the evidence is concluded to sum up the evidence respectively." Archibold, *CRIMINAL PLEADING, EVIDENCE AND PRACTICE* § 558 (1969); Jenks, THE BOOK OF ENGLISH LAW 74 (1967).

virtually "the law of the land" that a defendant had a right to have his attorney deliver a closing argument.[8] This right developed primarily as a component of a defendant's right to counsel and was recognized well before both the application of the Sixth Amendment's counsel provision to the States[9] and the Constitutional sanctioning of the non-jury trial.[10]

As early as 1827, the Supreme Court of Virginia recognized that in the jury trial, even where there was only one unimpeached prosecution witness and no defense presentation, "it is the right of every party to be heard by counsel on his whole case." *Word v. Commonwealth*, 30 Va. (3 Leigh) 743, 759 (1827). Other state courts readily followed suit, declaring that the right to closing argument was protected by their individual constitutional provisions guaranteeing the

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[8] Treatises on trial conduct written during the last century are unanimous in stating that the right to counsel encompasses the right to have counsel deliver a closing argument. E.g. Hilliard, ON NEW TRIALS §40 (1866); 1 Thompson, TRIALS §§921, 955 (1889); 2 Hyatt, TRIALS §1450 (1924); 5 Wharton, CRIMINAL LAW AND PROCEDURE §2077 (1957).

[9] *Gideon v. Wainwright, supra*, n. 6, 372 U.S. 335.

[10] *Patton v. United States*, 281 U.S. 276 (1930). While there were instances of jury-trial waivers prior to *Patton*, they occurred mainly during colonial times and by the end of the nineteenth century were common only in Maryland and West Virginia. See *Singer v. United States*, 380 U.S. 24 (1965); Orfield, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 491 (1947); Puttkammer, ADMINISTRATION OF CRIMINAL LAW 117 (1953); Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655 (1933-1934).

right to counsel.[11] Indeed, even prior to the Court's decision in *Gideon*, the Supreme Courts of Washington, Oregon and Alabama considered closing argument to be encompassed by both the federal and state constitutional guarantees of counsel.[12]

Today, the right to deliver a closing argument is contested only in the context of the non-jury trial. But, the weight of authority holds, nonetheless, that this right is guaranteed by the Sixth Amendment's counsel provision or the Due Process Clause of the Fifth and

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[11] *Lynch v. State*, 9 Ind. 541 (1857); *People v. Green*, 99 Cal. 564, 34 Pac. 231 (1893); *People v. McMullen*, 300 Ill. 383, 133 N.E. 328 (1921); *Sizemore v. Commonwealth*, 240 Ky. 279, 42 S.W. 2d 328 (1931); *State v. Ballenger*, 202 S.C. 155, 24 S.E. 2d 175 (1943); *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943); *State v. Hardy*, 189 N.C. 799, 128 S.E. 152 (1925); *State v. Hoyt*, 47 Conn. 518 (1880); *State v. Page*, 21 Mo. 257 (1855); *State v. Shehoudy*, 45 N.M. 516, 118 P. 2d 280 (1941); *State v. Tighe*, 27 Mont. 327, 71 Pac. 3 (1902); *State v. Verry*, 36 Kan. 416, 13 Pac. 838 (1887); *Stewart v. Commonwealth*, 117 Pa. 378, 11 A. 870 (1887); *Weaver v. State*, 24 Ohio St. 584 (1874); *Williams v. State*, 60 Ga. 363 (1898); *Wingo v. State*, 62 Miss. 311 (1884). Most of these cases arose in the context of improper limitations of counsel's closing argument.

[12] *State v. Mayo*, 42 Wash. 540, 85 Pac. 251 (1906); *State v. Rogoway*, 45 Or. 601, 78 Pac. 987; rehearing 45 Or. 611; 81 Pac. 234 (1904); *Yeldell v. State*, 100 Ala. 26, 14 So. 570 (1894).

Fourteenth Amendments.[13] Thus, in *United States v. Walls*, 443 F.2d 1220 (6th Cir., 1971), the court held that preclusion of closing argument in a non-jury trial deprived a defendant of the effective assistance of counsel. The same result was reached in *Thomas v. District of Columbia*, 90 F.2d 424 (D.C. Cir., 1937). In *United States ex rel. Spears v. Johnson*, 327 F.Supp.

[13]New York is the only state which, by statute, authorizes the trial court in a non-jury trial to dispense with closing argument. Although Indiana proposed a statute derived from and virtually identical to the New York provision challenged here [Ind. Code Crim. Proc., Proposed Final Draft § 35-6.1-7-1(c)3 (Sept., 1972)], it has not been enacted. Six make provision for closing argument without distinction between the jury or non-jury trial. See Ark. Stats. Ann., tit. 43, ch. 21, § 43-2132 (1947); Cal. Penal Code § 1093; Conn. Gen. Stats. Ann., tit. 54, ch. 96, § 54-88 (1958); Maine R. Crim. Proc. 30(a); Miss. Code Ann., tit. 99, ch. 17, § 99-17-11 (1972); Ohio Rev. Code Ann., tit. 29, § 2945.10 (1953). Others, as did New York prior to 1971, provide for closing argument specifically in the jury trial and are silent as to the non-jury trial. See, Ga. Code Ann., tit. 27, ch. 27-22, § 27-2201 (1972), Hawaii Rev. Stats., tit. 37, ch. 635 § 635-52 (Supp. 1972); Idaho Code Ann., tit. 19, ch. 21, § 19-2101 (1947); Ill. Ann. Stats., ch. 38, tit. VI, § 115-4 (1970); Iowa Code Ann., tit. 36, ch. 780 § 780.6 (1946); Ky. R. Crim. P. 9.42; Kan. Stats. Ann., ch. 22, art. 34, § 22-3414 (Supp. 1973); Mich. Comp. L. Ann., ch. 768, § 768.29 (1968); Minn. Stats. Ann., ch. 31, § 631.01 (1947); Mo. Ann. Stats. § 546.070 (1949); Rev. Code Mont., tit. 95, § 95-1910 (1947); Rev. Stats. Neb., ch. 29, § 29-2016 (1943); Nev. Rev. Stats., tit. 14, ch. 175, § 175.141 (1967); N.M.R. Crim. Proc. 40; Gen. Stats. N.C., ch. 84, § 84-14 (1963); N.D. Century Code, tit. 29, ch. 29-21, § 29-21-01 (1974); Okl. Stats. Ann., tit. 22, § 831 (1951); Ore. Rev. Stats., ch. 17, § 17.210 (1971); S.D. Comp. L. Ann., tit. 23, § 23-42-6 (1967); Tex. Code Crim. Proc., art. 36, § 36.01 (1966); Utah Code Ann., tit. 77, § 77-31-1(5) (1953); Wis. Stats. Ann., tit. 47, ch. 972, § 972.10 (1971); Wyo. Stats., tit. 7. § 7-228 (1957). The remaining states do not make any specific provision concerning closing argument.

1021 (E.D. Pa., 1971) rev'd. 463 F.2d 1024 (3rd Cir., 1972),[14] the court held preclusion of closing argument a deprivation of due process.

Similarly, a majority of state courts faced with the issue, pre- and post-*Gideon*, have held that the right of an accused to be heard on the evidence in a non-jury trial is guaranteed by either the Sixth or Fourteenth Amendments. *People v. Thomas*, 390 Mich. 93, 210 N.W. 2d 776 (1973); *Commonwealth v. McNair*, 208 Pa. Super. 369, 222 A.2d 599 (1966); *Commonwealth v. Gambrell*, 450 Pa. 290, 301 A.2d 596 (1973) [where the right was recognized but deemed waived]; *Yopps v. State*, 228 Md. 204, 178 A.2d 879 (1962); *Floyd v. State*, 90 So. 2d 105 (Fla. 1956); *Olds v. Commonwealth*, 10 Ky. (3 Ak. Marsh) 465 (1821).[15]

[14]The court's reversal was based upon a finding that the trial court had not, in fact, prohibited counsel from presenting a summation.

[15]Texas and Ohio in pre-*Gideon* decisions also confronted the issue and held that the right to a non-jury trial summation was guaranteed by their respective state constitutional gurantees of the right to counsel. *Walker v. State*, 133 Tex. Crim. 300, 110 S.W. 2d 578 (1937); *Ferguson v. State*, 133 Tex. Crim. 250, 110 S.W. 2d 61 (1937); *Anselin v. State*, 72 Tex. Crim. 17, 160 S.W. 713 (1913); *Decker v. State*, 113 Ohio St. 512, 150 N.E. 74 (1925).

Additionally, although in civil cases courts have been less strict in enforcing the right to closing argument [See Anno: Argument of Counsel, 38 ALR. 2d 1396, 1401 (1954)], two states have held that the right to deliver a closing argument in the civil non-jury trial is "absolute." *Callan v. Biermann*, 194 Kan. 219, 398 P.2d 355 (1965); *Aladdin Oil Burner Corp. v. Morton*, 117 N.J.L. 260, 187 A.350 (1936).

Most recently, the California Supreme Court held that a juvenile tried before a court without a jury is entitled to have his counsel deliver a closing argument. *In re* F., 113 Cal. Rptr. 170, 520 P.2d 986 (1974). In *dicta*, the court noted that a similar right was compelled in non-jury adult criminal proceedings.[16] The court's reasoning is applicable to both proceedings:

> As there is a constitutional right to the assistance of counsel to ascertain whether a juvenile has a defense to a jurisdictional charge and to "prepare and submit" a defense, it surely follows that counsel would be precluded from discharging his duties if, after all the testimony had been received, a presentation of the defense was limited by the denial of an opportunity, through argument, to reconcile the testimony with the juvenile's innocence of the charges and attempts to persuade the court to that view. The "guiding hand of counsel" would thus be withdrawn at an important "step of the proceedings against" the juvenile.[17]
>
> *In re F., supra,* 113 Cal. Rptr. at 173; 520 P.2d at 989.

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[16]This *dicta* is supported by *People v. Douglas*, 31 Cal. App. 3rd Supp. 26, 106 Cal. Rptr. 611 (App. Dept., 1973).

[17]The following courts have declined to recognize the right to present closing argument in the non-jury trial: *West v. United States*, 399 F.2d 467 (5th Cir., 1968) cert. den. 393 U.S. 1102 (1969); *Casterlow v. State*, 256 Ind. 214, 267 N.E. 2d 552 (1971); *Reed v. State*, 232 Ind. 68 (1953); *People v. Manske*, 399 Ill. 176, 77 N.E. 2d 164 (1948); *People v. Berger*, 284 Ill. 47, 119 N.E. 975 (1918); *Lewis v. State*, 11 Ga. App. 14, 74 S.E. 442 (1912). These courts have provided little elucidation of their reasons for the adoption of this rule. Indeed, in *Lewis v. State, supra,* no opinion was written. It is interesting to note, however, that in *People v. Manske, supra,* the court declared that as a general rule it was of the opinion that the court in a non-jury trial *should* listen to the arguments of counsel, even when it does *not* appear helpful. 399 Ill. 176 at 185, 77 N.E. 2d 164 at 170.

II.

Preclusion of a defendant's right to closing argument in a non-jury trial not only seriously dilutes the role of counsel in the presentation of the defense and thereby deprives him of his basic right to be heard; it also undermines the integrity of the fact-finding process and enhances the possibility of error in the ultimate verdict rendered.

An appreciation of the fact-finding process in a bench trial demonstrates that closing argument is perhaps more crucial to the presentation of a defense than in a jury trial. A judge does not differ from individual jurors in his ability to retain and assemble material which has come before him during the days or possibly weeks of trial. Judicial training, while affecting legal expertise, does not afford improved ability to remember or to reconstruct facts accurately. The fallibility of the human mind afflicts judges no less than jurors.

Moreover, a jury, by definition makes a collective judgment and, as Mr. Justice Powell has observed, "[t]his collective judgment tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision." See Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 4 (1966). A judge, in contrast, comes to his decision unaided by the recollections or points of view of others. In the absence of closing argument by the respective parties, the judge receives no in-put at all into his decision-making process that could minimize the possibility of a premature decision, counterbalance any prejudice developed during trial or alert him to possible error in his own

recollection of the evidence. Closing argument, however, diminishes the possibility of an erroneous verdict resulting from these human frailties.[18]

It is noteworthy that unlike the federal non-jury trial where counsel can require the court to render fact findings with its verdict[19] and thereby obtain at least some assurance that the fact-finder has considered the factual material and evaluated it *in toto*, New York has no comparable safeguard and thus the basis for the court's verdict is impenetrable. However, when the judge in the non-jury trial is required to hear closing arguments, at the very least, he must be attentive to the facts presented by opposing counsel and weigh their respective merits. Indeed, he may seek clarification of

[18]That these problems are very real in the bench trial is well illustrated in James, CRISIS IN THE COURTS 191, 192 (1967). The author quotes Professor Zeisel's statement that the theory that judges can be as fair as a jury "assumes that judges are perfect human beings . . . an assumption that is unfortunately far from the truth." Similarly, James quotes Donald Ross, a spokesman for the Milwaukee Defense Research Institute as saying: "While a judge has special legal knowledge, he is still just one person, filled with the prejudices and biases that are a part of each one of us." Finally, according to Jacob Fuchsberg, former president of the American Trial Lawyers Association and presently Associate Judge-Elect of the New York Court of Appeals:

> "Judges have no monopoly on intelligence, insight, or fairness. They are ordinary human beings like anyone else. I believe the opinions of 12 people are better than the opinions of one—and I don't care whether they are 12 lawyers, 12 judges or 12 laymen.
>
> "When 12 people must come to a decision, the prejudices that are inherent in most people get worked out in the discussion that is involved."

[19]Fed. R. Crim. Proc. 23(c).

troublesome aspects of the case through questions directed to counsel. In short, he would be unable to rest solely on his subjective belief that his recollection and understanding of the testimony was the only accurate portrayal available.

At this point in our history, closing argument is also of critical importance because of the tremendous caseloads handled by our courts. Urban courts, particularly, handle so enormous a volume of cases that they are able neither to mete out prompt and certain justice nor to give defendants the protections they should have.[20] Indeed, the Court has already recognized that in the lower criminal courts which process most of our criminal cases and which have a very high incidence of non-jury trials, speed and not truth is often the watchword.[21] A judge may handle many cases in a given day or week and may be too harried to give his undivided attention to the trial before him.[22] The

[20]President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS 1 (1967).

[21]*Argersinger v. Hamlin supra* n. 6, 407 U.S. 25 at 34-35. TASK FORCE REPORT: THE COURTS *supra* n. 19 at 55; Kalven & Zeisel THE AMERICAN JURY 18 (1966).

[22]As Dean Edward Barrett has observed of the lower criminal courts:

> "But if one enters the courthouse in any sizeable city and walks from court room to court room, what does one see? One judge, in a single morning, is accepting guilty pleas from and sentencing a hundred or more persons charged with drunkenness. Another judge is adjudicating traffic cases with an average time of no more than a minute *per* case. A third is disposing of a hundred or more

"case-hardened" judge may be inattentive for any number of reasons.[23] In such circumstances, closing argument may too easily be dispensed with as a time-saving device. Yet it is just such a situation which most threatens the reliability of our fact-finding process

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other misdemeanor offenses in a morning by granting delays, accepting pleas of guilty and imposing sentences.

Whenever the visitor looks at the system he finds great numbers of defendants being processed by harrassed and overworked officials.

Jones, Ed., THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 87 (1965).

[23]Indeed, inattentiveness has been ranked by one author as one of the leading causes of incompetence within the judiciary. Of the inattentive judges he writes:

These men have heard it all before, find judging boring, or simply couldn't care less. They lean back with their eyes closed, read, doodle on a legal pad or stare out of the window. I have watched some talk on the telephone or hold whispered conversations with aids who want papers signed while witnesses testify. And this has happened in non-jury cases.

In Miami Fla., Judge T_____ leaned back in his chair with his eyes closed, his arms behind his head, as he tried two men for running a bookie joint. A few minutes later he admitted in open court he 'wasn't paying attention' to some of the evidence.

CRISIS IN THE COURTS, *supra* n. 18 at 7.

The same problem was also pointed out by the Hon. Myron Gordon writing about the value of summation in the non-jury trial:

Before counsel waives oral argument, he would do well to consider whether the judge may have only appeared to be listening to the witnesses but did not in fact hear them. Counsel cannot really be sure that during the trial the judge was not thinking of some other case (or perhaps about his troublesome prostate).

Gordon, *Non-Jury Summations*, 6 Am. Jur. Trials 771, 777 (1967).

and which renders closing argument indispensable in a trial process which is premised on the assumption that a verdict will be based upon a fair evaluation of the evidence and not result from cynicism, boredom or pressure to move on to the next case.

Preclusion of closing argument also undermines the integrity of the judicial system and the public attitude toward it. When a trial judge, upon whom the public looks as the representative of the legal order,[24] refuses a request to argue on behalf of an accused, it appears not only to the defendant and his lawyer but to all in the courtroom, that he is arbitrary, possibly prejudiced against the defendant or has decided prematurely a matter which is gravely serious to those concerned. Because society's prevailing impression concerning the fairness of our legal institutions depends almost entirely upon observation of the trial court's integrity, humaneness and efficiency,[25] a statute sanctioning the appearance of arbitrariness and prejudice can only do harm to that

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[24]THE COURTS, THE PUBLIC AND THE LAW EXPLOSION, *supra* n. 22 at 125; TASK FORCE REPORT: THE COURTS, *supra* n.20 at 65-66.

[25]THE COURTS, THE PUBLIC AND THE LAW EXPLOSION, *supra* n. 22 at 125.

institution.[26] As the late Mr. Justice Frankfurter has written, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

The facts in this case underscore the importance of summation in the non-jury context. This was a trial which involved four witnesses, consisted of three days of testimony and extended over a five day period broken up by a weekend. The defense not only attacked the credibility of the complainant, who admitted prior drug use and familiarity with appellant, but also demonstrated a likely motive for Braxton to "fix" appellant and interposed an alibi corroborated by his employer that at the time of the crime he was at work. The only rebuttal to the alibi was that the crime occurred within walking distance of appellant's place of employment and it was possible for him to have sneaked out to rob the complaining witness.

In short, the evidence was in sharp conflict and before coming to its verdict the court had considerable

[26]Indeed, many have observed the pervasive belief among the impoverished and minority group residents of urban ghettos who enter our courtrooms either as defendants or as relatives or friends of the defendants, that justice is dispensed on an assembly-line basis by judges who are of predominantly white, middle-class backgrounds who are either unaware of their problems, indifferent to them or actually hostile to them. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 337 (Bantam Ed. 1968); Wright, *The Courts Have Failed the Poor*, N.Y. Times (Magazine), March 9, 1969, p. 26; President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 127, 128 (1967). Katz, *Municipal Courts–Another Urban Ill*, 20 Case West. L. Rev. 87, 90-91, 110, 122 (1968); THE AUTOBIOGRAPHY OF MALCOLM X 149-150 (Grove Press Ed. 1966).

detail to weigh. Appellant was entitled to have his attorney utilize his professional skill in pointing out the weaknesses in the prosecution's case and in marshalling the relevant and material evidence favorable to the defense into a cogent argument on his behalf. Deprived of this right, appellant was left to the mercy of the judge's subjective and impenetrable view of the case delivered in the form of a guilty verdict eight minutes after the close of the testimony.

In sum, Section 320.20(3)(c) of New York's Criminal Procedure Law disregards a fundamental tenet of our jurisprudence–that closing argument is basic to the concept of advocacy within our adversary system of criminal justice. A defendant is entitled to have "the guiding hand" of his attorney operate on his behalf in the fullest sense until the trier of fact retires to deliberate. Due process of law in this context can mean no less than Daniel Webster's often quoted phrase: "a law which hears before it condemns."[27]

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[27]See *Thomas v. District of Columbia*, 90 F.2d 424 at 428 (D.C. Cir., 1937).

CONCLUSION

WHEREFORE, FOR THE FOREGOING REASONS, APPELLANT PRAYS THE JUDGMENT BELOW BE REVERSED.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT

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CLIFFORD HERRING,

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BRIEF FOR RESPONDENT

Statement of Facts

Appellant was charged with attempted robbery in the first and third degrees and possession of a dangerous instrument in a three count indictment.

I. The Trial

On February 3, 4 and 7, 1972, a trial was held before the Hon. Theodore G. Barlow sitting without a jury.

A. The People's Case

Allen Braxton, the complaining witness, testified that appellant had attempted to rob him on September 15, 1971 behind Braxton's home at 7 Markham Drive, part of a Housing Authority Development on Staten Island.

On that date, Braxton had come home from work and gone into the house at about 5:30 p.m. Five or ten minutes later after greeting his mother and William Stubbs, a family friend and at that time a Housing Authority Patrolman, he went out. After he had walked up the block and returned to the rear of his house, Braxton decided to transfer the eleven dollars in his front pants pocket to his wallet because he "didn't want to lose it."

As he was standing alone behind his house, with the money in his hand, he claimed appellant approached him and said in a soft voice "Please give me some money, I am sick." Appellant, whom Braxton had known previously was wearing a suit and did not look sick.

Braxton testified that when he refused to give appellant the money, appellant took a knife out of his pocket and tried to cut him. Had Braxton not moved away, he would have been cut. He turned and ran into his house, not looking to see where appellant went. Braxton estimated that he had been standing behind his house about three minutes before appellant approached him and that the encounter with appellant lasted about a half a minute.

Inside his house, Braxton put the money back in his pocket and discovered that Stubbs was no longer there. When he found the patrolman in a house up the street, they began looking for appellant. According to Braxton, Stubbs called a police station and some policeman came to one of the housing projects a few blocks away. As

Braxton and Stubbs were walking to this project, at about 6:45 p.m. they saw appellant and approached him. A search of his person revealed the blade of a knife. "After a while", appellant voluntarily accompanied them to the Housing Authority's police office. Appellant was not handcuffed.

Later that night, Braxton went to the police station where he heard appellant say he was innocent and that he had been working at the time he was accused of having swung the knife.

Although Braxton denied being a heroin addict and stated that on September 15, 1971, the day of the alleged robbery he had not used any drugs, he admitted that he had been using heroin during August, 1971. He also admitted that one week after the incident he quit his job. He stated that he was eighteen years old and had had ten years of schooling. He had been sworn into the Marines the day before trial.

William Stubbs, the arresting officer, testified that he had known both appellant and Braxton prior to September 15, 1971. At about 5:00 p.m. he had been in the Braxton home keeping watch on one of the project buildings which had a large drug traffic. He did not recall seeing Braxton there before he left a little after five to keep watch from another house.

At about twenty minutes to six, Stubbs left the area and when he returned, shortly after six o'clock, he saw the complainant. After they spoke, they began to look for appellant. First, they checked all of the "Markham Homes" which took about 20 or 25 minutes. Then Stubbs went to the police room to notify his brother officer to keep a lookout for appellant.

After this, Stubbs left Braxton and patrolled the area by himself. About an hour later, he saw Braxton and

appellant on opposite sides of one of the neighborhood streets. When Stubbs approached, appellant informed him that he had been looking for him because he had heard the patrolman wanted to see him. Stubbs then informed appellant of Braxton's accusation of attempted robbery and appellant denied it stating that he could not have done it.

Appellant agreed to accompany Stubbs to the police office where he was arrested and then searched. Stubbs found a small knife blade which was introduced into evidence over objection.

Appellant informed Stubbs that he had been working for Mr. Taylor on Campbell Avenue. Stubbs contacted Taylor the next morning and testified that Taylor had said appellant had been working for him at 6:00 p.m. on September 15, 1971.

At the end of the People's case, the court dismissed the charge of possession of a dangerous instrument on the grounds that the little blade introduced into evidence did not come within the purview of the statute.

B. The Defense

Donald Taylor, the President of A & A Tank Cleaning Company at 116 Campbell Avenue on Staten Island testified that he employed appellant as a truck helper. He stated that at about 6:00 p.m. on September 15, 1971, appellant was at work. Taylor was unable to swear to the exact time he had seen appellant on his premises that day because it was not his policy to keep his employees under constant observation. However, he did remember seeing him there at about 5:30 or 6:00 p.m. on September 15, 1971.

Taylor stated that on that day he left his company at about 9:00 or 9:30 p.m. and gone home. He had only been home an hour when appellant called saying that he had been arrested.

Appellant testified that he did not approach Braxton and ask him for money. He had been working on a refrigerator in Mr. Taylor's shop until at least 6:30. Stubbs arrested him between 7:30 and 8:00, just after Mr. Taylor had "dropped him off" after work.

Appellant stated that he knew Braxton as a small boy and had also lived next door to him for a few months when appellant stayed with his parents at 9 Markham Drive. He stated that it was about a ten minute walk from Taylor's company to Braxton's house. Appellant also knew that Braxton had been on drugs. He stated that Braxton occasionally had asked appellant for money for drugs or wine and that appellant generally refused and told him to get work. On some of the occasions Braxton had threatened to "fix" appellant.

Appellant admitted that he had used drugs at one time and that in 1970 he had been twice convicted of petit larceny and once of possession of a hypodermic instrument. He stated that he was in the army from 1951 until 1955 when he was honorably discharged.

C. The Verdict

At the end of the defense case, counsel moved to dismiss the two remaining counts of the indictment on the grounds that the People had not made out a prima facie case and had failed to prove appellant's guilt beyond a reasonable doubt. Both motions were denied after which counsel asked:

"Well, can I be heard somewhat on the facts".

and the Court responded:

> "Under the new statute, summation is discretionary, and I choose not to hear summations."

After eight minutes of deliberation, the court found appellant guilty of attempted robbery in the third degree and acquitted the appellant of the count of attempted robbery in the first degree.

II. Sentence

On June 15, 1972, appellant was in court for sentencing. The prosecutor recommended the maximum term because he said appellant had a "long extensive criminal record". Appellant's attorney requested leniency and reminded the court of the sharp issues of fact at trial.

Appellant was sentenced to a maximum of four years imprisonment and is presently on parole. His conviction was affirmed in the state courts. The Supreme Court of the United States noted probable jurisdiction on October 21, 1974.

POINT I

Section 320.20 (3) (c) of the Criminal Procedure Law is constitutional and the trial court's refusal to hear summations in this case was proper.

I.

New York State is the only state with a statute of this kind. Undoubtedly there are cases in other jurisdictions in which the denial of a right to sum up constitutes reversible error. The appellant has cited a number of them.

But none of these cited cases appear to have the express statutory groundwork of New York. In the cases cited there is no statute at all and there is only a so called implied right to make an argument. In New York the defendant who waives a jury trial is on notice that he may have to surrender the right of summation. Having accepted the non-jury trial he takes it with all of its ramifications. The waiver of the jury trial was in writing executed by the appellant and in open court pursuant to statute (Criminal Procedure Law Section 320.10(2)).

There are moreover many cases in which courts have ruled that the denial of closing argument in a non-jury trial does not constitute reversible error.

In *People* v. *Manske,* 77 N E 2d 164 at 170, 399 Ill. 132 (1948) the Supreme Court of Illinois stated,

> "(12) It is also claimed that the trial court committed reversible error in declining to hear argument after the evidence was concluded. As a general rule, in a trial by the court without a jury, we are of the opinion that it is advisable in most instances for the court to listen to argument of counsel, even though it does not appear to be helpful to the court. The testimony was all taken in the presence of the trial judge; he had the opportunity to see and to hear the witnesses, and to observe the attitude and manner of testimony of the defendant. He could observe wherein he was contradicting his statements in court with those made to the officers, and could more properly judge the weight to be given the same than could we. It was perfectly natural for the defendant, after the body of the deceased was discovered, and the evidence of the bruises found upon her body, to soften as much as possible the description of the assaults, which he admits were committed.

(13) We are of the opinion that the argument of counsel in this particular case would not have aided the court very much. The same point was made in People v. Berger, 288 Ill. 47, 119 N.E. 975, and there the distinction was made between arguments before a court without a jury, and it was held argument to a jury was matter of right, but argument before a court, alone, was largely a matter of sound discretion of the trial judge. In this particular case the court believed the evidence sufficient to convict the defendant of manslaughter, and after so announcing told his counsel he would be heard upon the question of punishment, but declined to hear any argument upon the guilt of the defendant.

We are thoroughly satisfied of the guilt of the defendant beyond a reasonable doubt, and do not believe that the defendant was prejudiced in any way by the court declining to hear argument upon the merits of the cause."

The court exercised reasonable discretion in this case in not hearing summations. The case was a simple one. Only two people were present according to the victim. The defense was alibi but the alibi witness was vague about the time he saw the appellant. And of course the alibi location was in fact close to the scene of the crime. In the course of the trial the judge dismissed two of three charges.

In *West* v. *United States*, 399 F. 2d 467, 470 (5th Cir., 1968), cert. denied 393 U. S. 1102 (1969), it was held that in a non-jury trial conducted pursuant to the Federal Juvenile Delinquency Act a trial court has the right to preclude a closing argument. It is clear that proceedings against juveniles receive the basic constitutional protec-

tions. The juvenile is entitled to an attorney to protect his rights and to the right of confrontation and cross examination (*Kent* v. *United States,* 383 U. S. 541). He may not be adjudged a delinquent unless the proof is beyond a reasonable doubt. (*Matter of Winship,* 397 U. S. 358). Confessions taken in violation of his constitutional rights may not be introduced against him. (*Matter of Gault,* 387 U. S. 1, 55). In short, at the same time that this Court was strengthening and clarifying the rights of juveniles concerning their vital constitutional rights, by denying certiorari in *West* v. *United States supra,* it was stating, in effect, that where the case is tried without a jury that the judge may decline to hear summations. Summations in such cases are not such a critical step in the fact finding process so that denial of summation can be said to be violation of due process.

This question of the right to summarize should be left to the sound discretion of the trial court. In many instances hearings held prior to trial concerning, for example, searches and seizures, confessions or admissions, or wire taps and their supporting orders may be of greater significance than the trial itself insofar as the final disposition of the case. But respondent is unaware of any case which holds that the denial of argument is a denial of due process.

II.

Constitutional rights may be waived. For example in *Patton* v. *United States,* 281 U.S. 276, 305 the Court held in a case where the defendant consented to proceed with eleven jurors as a result of the illness of the twelfth and was convicted.

"See also *State* v. *Sackett,* 39 Minn. 69, where the court concludes its discussion of the subject by saying (p. 72):

> 'The wise and beneficent provisions found in the constitution and statutes, designed for the welfare and protection of the accused, may be waived, in matters of form and substance, when jurisdiction has been acquired, and within such limits as the trial court, exercising a sound discretion in behalf of those before it, may permit. The defendants, having formally waived a juror, and stipulated to try their case with 11, cannot now claim that there was a fatal irregularity in their trial.'"

In *Smith* v. *United States,* 360 U. S. 1, 9 the right of a defendant to waive the constitutional right of indictment pursuant to the Federal Rules of Criminal Procedure was recognized:

> "The use of indictments in all cases warranting serious punishment was the rule at common law. *Ex parte Wilson,* 114 U. S. 417; *Mackin* v. *United States,* 117 U. S. 348. The Fifth Amendment made the rule mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings. *Ex parte Bain,* 121 U. S. 1; *Hale* v. *Henkel,* 201 U. S. 43; *Toth* v. *Quarles,* 350 U. S. 11, 16. Rule 7(a) recognizes that this safeguard may be waived, but only in those proceedings which are noncapital."

In *Singer* v. *United States,* 380 U. S. 24 at pages 34 and 35 the Court stated:

"Thus, there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in *Patton*, in some instances waive his right to a trial by jury. The question remains whether the effectiveness of this waiver can be conditioned upon the consent of the prosecuting attorney and the trial judge.

The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States* v. *Kobli*, 172 F. 2d 919, 924 (C. A. 3d Cir. 1949) (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district, see *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U. S. 240, 245; *Kersten* v. *United States*, 161 F. 2d 337, 339 (C. A. 10th Cir. 1947), cert. denied 331 U. S. 851; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. Moreover, it has long been accepted that the waiver of constitutional rights can be subjected to reasonable procedural regulations: Rule 7 (b) of the Federal Rules of Criminal Procedure sets forth the procedure to be followed for waiver of the right to be prosecuted by indictment; Rule 20 describes the procedure for waiver of the right to be tried in the district in which an indictment or information is pending against a defendant; and Rule 44 deals with the waiver of the right to counsel."

Even such a deep seated right of a defendant not to be twice put in jeopardy for the same offense can be waived by failure to assert it (*Grogan* v. *United States*, 394 F. 2d 287).

We can deduce from these cases that if a person has no federally recognized right to a trial before a Judge sitting alone that he cannot engraft upon such a trial the procedures of a jury trial.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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Richmond County
Attorney for Respondent

NORMAN C. MORSE
Assistant District Attorney
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

MOTION OF THE STATE OF NEW YORK TO INTERVENE

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APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

MOTION OF THE STATE OF NEW YORK TO INTERVENE

The State of New York, a sovereign state of the United States of America, by and through its Attorney General, moves the Court for an order permitting it to intervene in the above entitled appeal, in which probable jurisdiction has been noted, and permitting the State of New York to file a brief in support of the constitutionality of its statute, Criminal Procedure Law, § 320.20(3)(c), and to participate in oral argument.

1. The only question involved on this appeal and the sole predicate of jurisdiction is whether § 320.20(3)(c) of the New York Criminal Procedure Law which authorizes a trial judge to prohibit closing argument in a non-jury trial is

violative of the due process clause of the Fourteenth amendment and the right to counsel provision of the Sixth amendment.

2. The State of New York is the real party in interest on this appeal which involves the constitutionality under the United States Constitution of a New York state statute duly enacted by the New York State Legislature.

3. The Attorney General did not participate in the proceedings in the New York State courts but now seeks to intervene in this Court on behalf of the sovereign state of New York in his statutory capacity, as a result of his statutory duty "[w]henever the constitutionality of a [New York State] statute is brought into question * * * it shall be the duty of the attorney general to appear in such action or proceeding in support of the constitutionality of such statute" (New York Executive Law, § 71) which right has been recognized by this Court (see Rule 42).

4. Since this appeal involves the constitutionality of a New York State Statute, it is important that the views of the chief legal officer of the State be presented to this Court. In addition the present representation is by the District Attorney of Richmond County whose primary interest is only upholding the judgment of conviction of the state court. The judgment of this Court may well affect a large number of nonjury criminal trials conducted in the State of New York since September 1, 1971, the effective date of the statute, and is therefore of vital interest to the State of New York.

5. At the present time the Attorney General of the State of New York is preparing his brief on behalf of the State of New York in support of the constitutionality of the New York State Statute, which, subject to the Court's permission will be filed before the end of the week of February

10th, 1975. The District Attorney of Richmond County supports the intervention of the State of New York in this cause, by the Attorney General of the State of New York.

6. In view of the paramount state interest herein involved leave is further requested to participate in the oral argument of this appeal, which participation has been consented to by the present attorney for the appellee, the District Attorney of Richmond County, without exceeding the time heretofore allotted to the appellee for the argument of this appeal.

7. In the alternative, leave is requested to file an amicus curiae brief by the end of the week of February 10th, 1975, pursuant to Rule 44, and for permission to argue this appeal on behalf of the State of New York pursuant to Rule 44, without exceeding the time heretofore allotted to the appellee for the argument of this appeal.

WHEREFORE, the State of New York prays leave to intervene, to file its brief, and to participate in oral argument.

Dated: New York, New York, February 7th, 1975.

Respectfully submitted,

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IN THE

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October Term, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

v.

NEW YORK,

Appellee.

Appeal from the Appellate Division of the Supreme Court of the State of New York, Second Department

REPLY BRIEF FOR APPELLANT

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IN THE

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REPLY BRIEF FOR APPELLANT

ARGUMENT

Appellee's argument that this case presents a waiver issue is without merit.

The only issue on this appeal is the right of a criminal defendant to closing argument in a non-jury trial. The statute in question which gives the trial judge discretion to preclude summations, assumes that there is no such right, and pursuant to the trial court's invocation of this statute, appellant was denied the right to summation. It

is disingenuous for the State to argue that this statute which abridges the constitutional right to summation in a non-jury trial, creates by its very existence a waiver of the right abridged when, under another statute, the defendant executes a waiver of a trial by jury. The underlying assumption of this argument is that the State may reasonably condition the exercise of the statutory right to a non-jury trial upon the waiver of the right to summation. The argument ignores the fact that the constitutional right to jury trial and the constitutional right to summation are separate and distinct and also distorts well-developed concepts of waiver.

While reasonable procedural regulations may be attached to the defendant's waiver of a jury trial, they may concern only those matters which relate directly to the waiver itself, such as the federal requirement that the court and prosecutor consent to the waiver or New York State's requirements of a written, court-approved waiver made in open court. *Cf. Singer* v. *United States,* 380 U.S. 24, 35 (1965); see also *Patton* v. *United States,* 281 U.S. 276, 312-313 (1930). None of the procedures discussed in *Singer* (380 U.S. at 36, 37) conditioned the waiver of a jury upon the defendant's waiver of an independent constitutional right, and the State's "legitimate interest" in insisting on a jury trial (*Singer* v. *United States,* 380 U.S. at 36) does not entitle it to impose such a condition. Once a defendant meets the reasonable procedural requirements for jury waiver as set forth in section 320.10, he has the right under New York law to be tried by the court. He cannot be penalized for exercising that right by being deprived of the right to be heard by counsel. Compare *Green* v. *United*

States, 355 U.S. 184, 194 (1954) (conditioning the exercise of the statutory right of appeal upon "waiver" of a valid plea of double jeopardy); see also *North Carolina* v. *Pearce,* 395 U.S. 711, 724-725 (1969) (imposing a penalty upon defendant for successful pursuit of statutory right to appeal). Where the State seeks to impose such an unconstitutional condition, as is implicit in appellee's argument, then the litigant's forced acceptance of the condition cannot operate as a waiver of his constitutional objection.

> "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of failure to accept it, and then to declare the acceptance voluntary * * *." *Garrity* v. *New Jersey,* 385 U.S. 493, 498 (1967), quoting from *Union Pac. R.R. Co.* v. *Pub. Service Comm.,* 248 U.S. 67, 69 (1918).

Appellant's choice of a non-jury trial did not, therefore, waive his right to object to the denial of summation.

Even if the State may condition waiver of a jury trial upon the waiver of the right to summation, no such waiver could be gleaned from this record. The existence of a statute which incorrectly provides that a constitutional right does not exist does not amount to a waiver of a federal constitutional right. Since, as demonstrated in our brief in chief, a defendant's right to have his attorney deliver a closing argument is essential to a fair criminal trial, the "strict standard" of establishing an "intentional relinquishment or abandonment of a known right or privilege" is applicable. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 241 (1973); *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1937). *Brookhart* v. *Janis,* 384 U.S. 1 (1965). Inherent in this

standard is the precept that waiver will not be presumed from a silent record but, rather, that every reasonable presumption against waiver will be indulged. *Carnley* v. *Cochran*, 369 U.S. 506, 516 (1962); *Glasser* v. *United States*, 315 U.S. 60, 70 (1941).

Indeed, even absent such presumptions against waiver, counsel's request to deliver a closing argument must dispel any thought that the right had been intentionally waived. The first and only explicit reference to closing argument on this record occurs at the close of the defense when counsel asked to be heard in spite of the court's statement that it would not hear summation.[1] It was only at that time that the court revealed to appellant that section 320.20(3)(c) deprived him of the right to have his attorney make a closing argument. All prior discussions between the court and appellant concerning the consequences of appellant's waiver of a jury trial did not extend beyond the waiver of the jury itself.[2] Similarly, the document which appellant signed recited only that he waived a jury trial with "full understanding of the rights which I waive hereby."[3]

Furthermore, given the statutory framework here, the suggestion of waiver appears to be one made of whole cloth by counsel for the State and the District Attorney. Contrary to the State's argument that the existence of section 320.20(3)(c) gives notice to a defendant that his waiver of a jury trial also waives his absolute right to summation, this statute simply gives warning that the con-

1. App. 92.

2. Brief of Attorney General, App. B at 24-26.

3. Brief of Attorney General, App. C at 30.

stitutional deprivation may occur, not that it may not be objected to. At the same time the New York State Legislature enacted section 320.20(3)(c), it also enacted an identical provision applicable to non-jury misdemeanor trials, N.Y.C.P.L. §350.10(3)(c), which governs misdemeanor trials in which there is often no right to a jury trial.[4] Thus the New York rule that there is no right to summation in a non-jury case operates whether the non-jury trial is the result of a waiver or the result of a lack of entitlement to a jury. Consequently, counsel could—and did here—reasonably conclude that his client's waiver of the jury right did not subsume a waiver of his objection to the constitutional deprivation.

In sum, the only waiver which operated in this case was appellant's waiver of a jury trial. There was no waiver of the right to summation in a non-jury case because the State never afforded appellant that right, because such a waiver would constitute an improper condition upon his exercise of his statutory right to forego a jury, and because the record conclusively refutes the existence of an intentional relinquishment by appellant or his counsel of the right. To contend that appellant somehow tacitly waived his separate constitutional right to closing argument by his affirmative waiver of his right to jury trial finds no support in the statutory scheme, in the record, in the law of waiver or in common sense.

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4. *Baldwin* v. *New York*, 399 U.S. 66 (1970).

Conclusion

Wherefore, for the foregoing reasons, appellant prays the judgment below be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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Appellant,

against

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APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

Interest of the Attorney General of the State of New York

This appeal involves the constitutionality under the United States Constitution of a New York State Statute, Criminal Procedure Law, § 320.20(3)(c), which provides that in a non-jury trial "the court may in its discretion permit the parties to deliver summations", which statute was duly enacted by the New York State Legislature.

The Attorney General did not participate in the proceedings in the New York State courts but now seeks to file his brief with this Court on behalf of the sovereign state of New York in his statutory capacity, as a result of his statutory duty "[w]henever the constitutionality of a [New

York State] statute is brought into question * * * it shall be the duty of the attorney general to appear in such action or proceeding in support of the constitutionality of such statute" (New York Executive Law, § 71) which right is recognized by this Court (Rule 42).

Since this appeal involves the constitutionality of a New York State Statute, it is important that the views of the chief legal officer of the State be presented to this Court. In addition the present representation is by the District Attorney of Richmond County whose primary interest is only upholding the judgment of conviction of the state court. The judgment of this Court may well affect a large number of non-jury criminal trials conducted in the State of New York since September 1, 1971, the effective date of the statute, and is therefore of vital interest to the State of New York.

In view of the paramount state interest herein involved leave is requested to file the within brief at this time, beyond the time limits provided in Rule 42.

Question Presented

Does a New York defendant in a criminal non-jury trial have a federally protected constitutional right to sum up to the trial judge prior to the rendition of his verdict, or does the trial judge have discretion to refuse to listen to closing argument without violating any fundamental federal constitutional right of the defendant?

Statement

A. The New York Constitutional and Statutory Scheme

The substantive question on this appeal involves the constitutional validity under the United States Constitution, of the New York constitutional and statutory scheme, which

grants to a criminal defendant an unconditional and unrestricted right, subject to judicial supervision, to waive a jury trial, in all cases, except those in which the crime charged may be punishable by death, and under which waiver the defendant may knowingly lose the right to have his attorney sum up to the court prior to the rendition of the verdict.

The New York State Constitution grants unto the defendant in all cases not involving a crime punishable by death, a constitutional right to waive a jury trial and to be tried by a judge. The provision is found in Article 1, § 2 of the New York State Constitution, which provides in pertinent part:

> "A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver."[1]

Prior to 1971 there were no statutory enactments relating to the waiver of a jury trial or the conduct of non-jury trials in criminal cases, which were governed by the con-

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[1] The complete text of Article 1, § 2 of the New York State Constitution is found in McKinney's Consolidated Laws of New York Annotated and is set forth in Appendix "A", *infra*, at page 18, together with the pertinent provisions of the New York Criminal Procedure Law relating to the waiver of, and the conduct of non-jury trials; § 320.10, Non-jury trial; when authorized (pp. 19-20); § 320.20, Non-jury trial; nature and conduct thereof (pp. 20-21); § 260.30 jury tral; in what order to proceed (p. 22; parts of § 260.30 relating to "[t]he order in which evidence must or may be offered" in a jury trial is incorporated by reference into § 320.20(3)(b), relating to non-jury trials).

stitutional provision and judicial decisions (see *People* v. *Duchin*, 12 N Y 2d 351, 239 N.Y.S. 2d 670, 190 N.E. 2d 17, 1963; *People ex rel. Rohrlich* v. *La Follette*, 20 N Y 2d 297, 282 N.Y.S. 2d 729, 229 N.E. 2d 419, 1967). In 1971 New York enacted a new Criminal Procedure Law, effective September 1, 1971, which for the first time made legislative provision for the waiver of jury trial in criminal cases (CPL § 320.10), and for the conduct of non-jury trials (CPL § 320.20), which implemented the jury waiver provision of the New York Constitution as interpreted by the New York Court of Appeals (see *People ex rel. Rohrlich* v. *La Follette, supra; Denzer,* Practice Commentary to § 320.10 at pp. 603, 604).

CPL § 320.10 provides for the waiver of jury trial in non-capital cases which "must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court. The court must approve the execution and submission of such waiver unless it determines that it is tendered as a stratagem to procure an otherwise impermissible procedural advantage *or that the defendant is not fully aware of the consequences of the choice he is making.*" (CPL § 320.10[2]; Emphasis supplied).

CPL § 320.20 for the first time in New York provides for the nature and conduct of non-jury criminal trials. It provides *inter alia* that "[t]he court in addition to determining all questions of law, is the [exclusive] trier of all issues of fact and must render a verdict" (subparagraph 2). It further provides the "order of the trial" (subparagraph 3), providing that "[t]he court may in its discretion permit the parties to deliver opening addresses (subdivision a); that the "order in which evidence must or may be offered" is the same as provided for jury trials (subdivision b); that "*[t]he court may in its discretion permit the parties to deliver summations*" (subdivision c), which is

sub judice; and that "[t]he court must then consider the case and render a verdict" (subdivision d). Subparagraphs 4 and 5 make all other provisions relating to jury trials "so far as practicable and appropriate" also applicable to a non-jury trial.

B. The Defendant's Waiver of Trial by Jury

On January 28, 1972, the defendant, together with his attorney, appeared before the trial court and advised Justice Barlow, who eventually conducted the trial, that the defendant desired to have his case tried by a judge, without a jury.[2]

Pursuant to Article 1, § 2 of the New York State Constitution and § 320.10 of the New York Criminal Procedure Law, Justice Barlow conducted a hearing to determine that "the defendant [was] fully aware of the consequences of the choice he is making" and precisely what rights the defendant was giving up (CPL § 320.10[2]).

The following colloquy between Justice Barlow and the defendant occurred during such Waiver of Jury Trial Hearing [Appendix "B", *infra,* pp. 23-25].

> "The Court: Now, Mr. Herring, [the defendant] it is my duty to inquire of you whether you fully appreciate what you are doing when you waive a jury trial. It is your right to waive the jury trial, but it is my duty to ask you if you fully appreciate what you are doing when you waive a trial by jury. Whether you know it or not, I will tell you, that under the constitution of the United States and the State

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[2] The transcript of such hearing is set forth in full in Appendix "B", *infra,* pp. 23-29.

of New York, you are entitled to a trial by jury. Now, if you waive that right which you have by statute, provided I am satisfied that you know what you are doing when you waive the trial, a jury trial, this is what will happen. There will be no jury sitting in this box. The decision, not only on the law, but also on the facts will be made by the judge who sits here. Probably myself, but it doesn't matter. If you waive a jury, you waive a jury for all purposes, and whatever judge is sitting here will try you without a jury to decide on the facts of the case.

Now this means you are putting your faith on the facts as well as the law in the hands of the judge who sits here. Do you fully understand that?

The Defendant: Yes, I do.

The Court: And do you still wish to waive a trial by jury?

* * *

The Defendant: Yes."

The court then proceeded to continue to interrogate the defendant as to the charges under the indictments [Appendix "B", *infra*, p. 26]

"The Court: * * * Now with full realization of the facts, do you still want to waive a jury trial and submit your fate to one man, the man who sits in this chair? Is that what you want to do, Mr. Herring?

The Defendant: Yes, your Honor."

The defendant then signed a "Waiver of Jury Trial", witnessed by his counsel and approved by Justice Barlow, as required by the New York State Constitution Art. 1, § 2 and CPL § 320.10, fully aware that he was waiving an inviolate right guaranteed to him by the United States

Constitution "and with full understanding of the rights [he was] waiv[ing]."[3]

C. The Trial and Verdict

During the trial the the trial justice took "copious notes" of the testimony as attested to by defendant's counsel (App. 66).[4] At the conclusion of the State's case the defendant's counsel moved to dismiss each of the three counts of the indictment.[5] The motion was denied as to the first two counts involving attempted robbery but granted as to the third count involving possession of a "dangerous instrument" (App. 66-68).

At the conclusion of the trial, Justice Barlow permitted the making of motions but advised that he would "not permit summations." The defendant's counsel then renewed his motion to dismiss the two remaining counts for attempted robbery, giving his reasons therefor. Such motion again was denied by Justice Barlow, who then refused to hear the defendant's counsel "on the facts", since as he stated:

> "The Court: Under the new statute, summation is discretionary, and I choose not to hear summations." (App. 92)

The Court then retired to deliberate a verdict and then found the defendant "not guilty" on the more serious

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[3] A copy of such Waiver of Jury Trial signed by the defendant and witnessed by Justice Barlow is reproduced in Appendix "C", *infra*, pp. 30-31.

[4] Numerical references preceded by "App." are to the printed main appendix.

[5] The defendant was charged with Attempted Robbery in the First Degree (Penal Law § 160.15); Attempted Robbery in the Third Degree (Penal Law § 160.05) and Possession of Weapons and Dangerous Instruments and Appliances (Penal Law, § 265.05).

charge of attempted robbery in the first degree and "guilty" of the lesser charge of attempted robbery in the third degree (App. 93).[6]

Summary of Argument

The New York constitutional and statutory scheme, which grants to a criminal defendant an unconditional and unrestricted right, subject to judicial supervision, to waive a jury trial in all non-capital cases, and under which waiver the defendant may knowingly lose the right to sum up to the trial judge prior to the rendition of the verdict does not violate any fundamental federal constitutional right of the defendant.

The United States Constitution guarantees to every defendant charged with a crime the right to trial by jury which right is inviolate (Article 3, Section 2, Clause 3; Sixth Amendment). However, a person charged with a crime punishable by imprisonment may consistently with the United States Constitution waive trial by jury and consent to a trial by the court without a jury (*Patton* v. *United States*, 281 U.S. 276, 1930). The federally protected constitutional right to trial by jury does not give rise to a correlative right to trial without jury. There is no federal constitutional right to trial without a jury in a criminal case, since the ability to waive a constitutional

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[6] The charge of attempted robbery in the first degree (New York Penal Law, § 160.15) of which defendant was acquitted is a class B felony, which if he had been convicted would have subjected him to an indeterminate sentence "not to exceed twenty-five years", whereas the charge of attempted robbery in the third degree (New York Penal Law, § 160.05) of which defendant was convicted is a Class D felony, which subjected him to an indeterminate sentence, "not to exceed seven years" (New York Penal Law, § 70.00[2]). He was sentenced to an indeterminate term not to exceed four years (App. 96) and has been released on parole.

right does not carry with it the right to insist upon the opposite of that right. Moreover, it has long been accepted that the waiver of constitutional rights can be subjected to reasonable procedural regulations (*Singer* v. *United States*, 380 U.S. 24, 1964). In addition thereto a defendant may waive his constitutional right to assistance of counsel and waive a trial by jury against the advice of his lawyer (*Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 1942).

The New York procedure for the waiver of jury trial is designed for the benefit of the defendant which he is entitled to as a matter of right once it is determined that it is tendered in good faith and the defendant understands what he is doing, which is all the Due Process Clause requires (*McCarthy* v. *United States*, 394 U.S. 459, 1969).

A New York defendant contemplating a waiver of trial by jury does so with the explicit knowledge that if he waives a trial by jury he may also be waiving summation by his attorney in the discretion of the trial judge. He may protect his right to summation simply by not waiving his constitutional right to be tried by a jury. However, once he waives his constitutional right to trial by jury, he also waives his right to summation, if the trial judge declines to hear summation, all of which the defendant does knowingly with the assistance of counsel and he is fully aware of the consequences of the choice he is making.

Since there is no federal constitutional right to trial without a jury, and the federal constitutional right to jury trial may be waived, as well as the constitutional right to the assistance of counsel in making such waiver, there is nothing in the Federal Constitution which prohibits the State of New York from providing that inherent in the waiver of jury trial, and forming part of such waiver, is the waiver of the unconditional right to sum up at the

conclusion of the evidence, which may or may not be granted in the discretion of the trial judge.

ARGUMENT

A New York defendant in a criminal non-jury trial has no federally protected constitutional right to sum up to the trial judge prior to the rendition of his verdict, and under the New York scheme the trial judge has discretion to refuse to listen to closing argument without violating any fundamental federal constitutional right of the defendant.

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1257(2) and therefore the only question presented to this Court is whether New York Criminal Procedure Law § 320.20(3)(c) is repugnant to the United States Constitution. In other words, does a New York defendant in a criminal non-jury trial conducted after September 1, 1971, the effective date of the statute, have a federally protected constitutional right to sum up to the trial judge prior to his rendition of the verdict or does the trial judge have discretion to prohibit closing argument, without violating any fundamental federal constitutional right of the defendant. Unless there is such right under the United States Constitution, this Court must as a matter of constitutional law either affirm the state court conviction or dismiss this appeal.

In order to answer this question it is necessary to trace the evolution of criminal non-jury trials in the United States.

The United States Constitution guarantees to every defendant charged with a crime the right to trial by jury which right is inviolate (Article 3, Section 2, Clause 3; Sixth Amendment). Before the decision of this Court, in 1930 in *Patton* v. *United States,* 281 U.S. 276 that the

constitutional right to trial by jury could be waived, the federal courts and those in most of the States required that the trial of a crime be held before a common-law jury of 12 and forbade the waiver of such a jury.[7]

In 1858 the New York Court of Appeals in *Cancemi* v. *The People,* 18 N.Y. 128, 135-138, crystallized the then inflexible rule that a person charged with a crime was not permitted to waive a trial by jury. In that case as in *Patton* v. *United States, supra,* decided by this Court almost 75 years later, in open court and under the guidance and advice of counsel the defendant, on trial charged with murder, consented to the discharge of a juror and the continuation of the trial by 11 jurors. On appeal, following his conviction, the main issue raised the impropriety of the proceedings. In reversing the judgment, the New York Court of Appeals held, in effect, that in the absence of a constitutional provision, even the Legislature could not dispense with a common-law jury. *Cancemi* influenced many other jurisdictions to adopt similar views (see *Patton* v. *United States,* 281 U.S. at 302). Thereafter, the federal government as well as many States permitted waiver of trial by jury in a criminal case. In some States the right so accorded a defendant is absolute and unqualified such as in New York. In others, such as under the Federal Rules of Criminal Procedure, the consent of the prosecutor, the approval of the court, or both are required. Whether treated as a privilege or a right, in some jurisdictions it was accom-

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[7] One of the notable exceptions existed in Maryland, where during the colonial period criminal trials had been conducted by the courts alone on waivers. This procedure was confirmed by a legislative act in 1809 and a constitutional amendment in 1867. For a discussion of the English and early American attitudes toward non-jury trials see *The Historical Development of Waiver of Jury Trials in Criminal Cases* by Erwin N. Griswold, 20 Va. L. Rev., p. 655 (1934); see also *Singer* v. *United States,* 380 U.S. 24, 28-31 (1964); *People* v. *Cosmo,* 205 N.Y. 91, 96-97, 98 N.E. 408 (1912).

plished by means of a constitutional provision or by statute, in some by judicial decision, and in others, as in the Federal system by rules of procedure.[8]

Finally, in 1930 this Court, in discarding the inflexible *Cancemi* rule in respect to the federal system in *Patton* v. *United States*, 281 U.S. 276 held that "a person charged with a crime punishable by imprisonment for a term of years may consistently with the [United States Constitution], waive trial by a jury of twelve persons and consent to a trial by any lesser number, or by the court without a jury" (281 U.S. at 290); that "the framers of the Constitution simply were intent upon preserving trial by jury pri-

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[8] *Arkansas:* (1874) Constitutional provision requires statutory implementation. Statute limited to misdemeanors.

California: (1928) Constitutional amendment. Consent of the prosecution and the defendant is mandated. *People* v. *Benjamin*, 140 Cal. App. 2d 703, 295 P. 2d 477 (1956); *People* v. *Eubanks*, 7 Cal. App. 2d 588, 46 P. 2d 789 (1935).

Connecticut: (1921) Statute. Court may not deny waiver.

Georgia: Code. The Court may deny a waiver of trial by jury. *Palmer* v. *State*, 195 Ga. 661, 25 S.E.2d 295 (1943).

Illinois: (1941) Code. Court may not deny waiver. *Illinois* v. *Spegal*, 5 Ill. 2d 211, 125 N.E.2d 468 (1955).

Indiana: (1926) Statute. The Court may deny a demand for a non-jury trial. *Mitchel* v. *State*, 233 Ind. 16, 115 N.E.2d 595 (1953); *Alldredge* v. *Indiana*, 239 Ind. 256, 156 N.E.2d 888 (1959).

Kansas: The Court may reject defendant's waiver of a jury trial. *State* v. *Ricks*, 173 Kan. 660, 250 P.2d 773 (1952).

Maryland: (1867) Constitution. (1924) Statute.

Massachusetts: The Court has a right to reject the waiver filed. *Commonwealth* v. *Millen*, 289 Mass. 441, 194 N.E. 463 (1935); *Commonwealth* v. *Rowe*, 257 Mass. 172, 153 N.E. 537 (1926), 48 A.L.R. 762. See Annotation (Right to waive trial by jury in criminal cases, 48 A.L.R. at 767-778) for earlier rule in various States.

Michigan: (1927) Statute. The Court may disregard a jury waiver in a criminal case. *City of Grand Rapids* v. *Bateman*, 93 Mich. 135, 53 N.W. 6 (1892).

Minnesota: (1857). Constitution provides for a statute. No statute.

(*footnote continued on following page*)

marily for the protection of the accused" (281 U.S. at 297); and Article III, Section 2, Clause 3, "was meant to confer a right upon the accused which he may forego at his election," (281 U.S. at 298).

However, the federally protected "Constitutional right to trial by jury does not give rise to a correlative right to trial without jury." (*United States* v. *Igoe,* 7th Cir. 1964, 31 F. 2d 766, cert. denied, 380 U.S. 924, rehearing denied, 380 U.S. 989) and "there is no constitutional right to a non-jury trial" (*United States* v. *Bowles,* 2d Cir. 1970, 428 F. 2d 592, cert. denied, 400 U.S. 928) and "[a]n accused has no absolute or exclusive right to elect a trial by the court alone without a jury" (*United States* v. *Clausell,* 2nd

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(footnote continued from preceding page)

New Mexico: Before any waiver can become effective, the sanction of the Court must be had. *State* v. *Shroyer,* 49 N.M. 196, 160 P.2d 444 (1945).

North Carolina: (1876) Constitution.

Ohio: (1930) Statute. The Court may refuse to honor a jury waiver. *Ickes* v. *State,* 63 Ohio St. 549, 59 N.E. 233 (1900); *State ex rel. Warner* v. *Baer,* 103 Ohio St. 585, 134 N.E. 786 (1921).

Oklahoma: (1907) Self-executing constitutional provision.

Pennsylvania: No waiver permissible in absence of statute. See *Commonwealth* v. *Hall,* 291 a. 341, 140 Atl. 626 (1928), 58 A.L.R. 1023 and Annotation (Right to waive trial by jury in criminal cases, 58 A.L.R. at 1031-1032).

Virginia: Constitution and Statute. Waiver requires consent of the prosecutor and of the Court. See *Dixon* v. *Commonwealth,* 161 Va. 1098, 172 S.E. 277 (1934); *Boaze* v. *Commonwealth,* 165 Va. 786, 183 S.E. 263 (1936).

Washington: (1929) Statute. Court must approve.

Wisconsin: (1848) Constitution providing for statutory implementation; (1929) Statute.

Alabama, Nebraska, New Hampshire and *Tennessee,* among others, permit jury waivers in certain instances by judicial decision.

United States: Federal Rules of Criminal Procedure, Rule 23(a), which provides:

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

Cir. 1968, 389 F. 2d 34). As stated by Chief Justice Burger, when he sat on the Court of Appeals for the District of Columbia in *Dixon* v. *United States,* 1961, 292 F. 2d 768, 769:

> "There is of course an absolute right to trial by jury in every criminal case, but *there is no absolute right to trial by the court without a jury.*" [Emphasis supplied].

This Court held in *Singer* v. *United States,* 380 U.S. 24, 34-35 (1964), that there is no federal constitutional right to trial without a jury in a criminal case[9] since "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."

In *Singer* the defendant contended "that a defendant in a federal criminal case has not only an unconditional constitutional right, guaranteed by Art. III, § 2, and the Sixth Amendment, to a trial by jury, but also a correlative right to have his case decided by a judge alone if he considers such a trial to be to his advantage." He further contended that such right could not be conditioned upon "the approval of the court and the consent of the government" as required by Rule 23(a) of the Federal Rules of Criminal Procedure (380 U.S. at 25-26). In rejecting this contention and holding that there is no such constitutional right to a non-jury trial and "the effectiveness of this

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[9] This does not prevent a state such as New York from granting such a right under its State Constitution since "[o]f course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake" (*Lego* v. *Twomey,* 404 U.S. 477, 489, 1972). However, such higher standard imposed by the State does not engraft such right into a federally protected constitutional right.

waiver, can be conditioned upon the consent of the prosecuting attorney and the trial judge" this Court held, 380 U.S. at 34, that

> "there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in *Patton*, in some instances waive his right to a trial by jury."

"Moreover," as was pointed out in *Singer*, 380 U.S. at 35 "it has long been accepted that the waiver of constitutional rights can be subjected to reasonable regulations." Thus as this Court held in *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 277-278 (1942) a defendant may "waive his constitutional right to assistance of counsel" and waive a trial by jury against the advice of his lawyer,[10] when the Court stated, 317 U.S. at 269

> "an accused in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently waive his constitutional right to assistance of counsel. There is nothing in the constitution to prevent an accused from choosing to have his fate tried before a judge without a jury, even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer."

The New York constitutional provision for a waiver of a jury trial "is designed for the benefit of the defendant [which] he is entitled to as a matter of right . . . once it appears to the satisfaction of the judge of the court having

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[10] Appellant's constitutional argument is based on the right to counsel provision of the Sixth Amendment. However, this, which is his only constitutional argument must fail since he may "waive his constitutional right to assistance of counsel" and waive a trial by jury against the advice of his lawyer.

jurisdiction that, first, the waiver is tendered in good faith and is not a stratagem to procure an otherwise impermissible procedural advantage . . . and second that the defendant is fully aware of the consequences of the choice he is making. The requirement that the judge give his 'approval' to the waiver was intended . . . 'to assure [the defendant] . . . full opportunity to understand what he is doing.'" (*People* v. *Duchin,* 12 N Y 2d 351, 352-353, 239 N.Y.S. 2d 670, 190 N.E. 2d 17, 1963) and "is designed to insure that the defendant's waiver is a knowing and intelligent one." (*People ex rel. Rohrlich* v. *Follette,* 20 N Y 2d 297, 300-301, 282 N.Y.S. 2d 729, 229 N.E. 2d 419, 1967).

As a matter of constitutional requirement "for this waiver [of trial by jury] to be valid under the Due Process Clause, it must be an 'intentional relinquishment or abandonment of a known right or privilege.'" (*McCarthy* v. *United States,* 394 U.S. 459, 466, 1969; *Johnson* v. *Zerbst,* 304 U.S. 458, 465, 1938) and the New York procedure to waive trial by jury so requires and is therefore in full compliance with the Due Process Clause.

Pursuant to New York Criminal Procedure Law, § 320.20 (3)(c), "[t]he court may in its discretion permit the parties to deliver summations" in a criminal non-jury case. Since September 1, 1971, the effective date of the statute a New York defendant contemplating a waiver of trial by jury does so with the explicit knowledge that if he waives trial by jury he may also be waiving summation by his attorney, in the discretion of the trial judge. He may protect his right to summation "[a]t the conclusion of the evidence" simply by not waiving his constitutional right to be tried by a jury (CPL § 260.30[8]; Appendix "A", *infra,* p. 22). However, once he waives his constitutional right to trial by jury, he also waives his right to summation, if the trial judge declines to hear summation, all of which the defendant does knowingly with the assistance of counsel and

he is fully aware of the consequences of the choice he is making.[11]

Since there is no federal constitutional right to trial without a jury, and the federal constitutional right to jury trial may be waived, as well as the constitutional right to the assistance of counsel in making such waiver, there is nothing in the Federal Constitution which prohibits the State of New York from providing that inherent in the waiver of jury trial, and forming part of such waiver, is the waiver of the unconditional right to sum up at the conclusion of the evidence, which may or may not be granted in the discretion of the trial judge.[12]

CONCLUSION

The order of the Appellate Division of the Supreme Court of the State of New York, Second Department should in all respects be affirmed.

Dated: New York, New York, February 14, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pro Se Pursuant to New York Executive Law §71

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[11] The decision in this case may be of very limited national significance since New York is the only State which, by Statute authorizes the trial court in a non-jury trial to dispense with closing argument. (See Brief for Appellant, footnote 13 at page 15).

[12] Whether or not the failure of the trial judge to grant summation in a particular non-jury case is an abuse of discretion is a matter strictly for the state court, and is certainly not of constitutional dimensions.

APPENDIX A

New York Constitutional Provision and Statutes Relating to Non-Jury Trials.

McKinney's Consolidated Laws of New York Annotated

Book 2 (Constitution Article 1 to 2)
Article 1, Section 2 (pp. 55, 56, 204)

§ 2. [Trial by jury; how waived]

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

Amended Nov. 8, 1938, eff. Jan. 1, 1939.

Book 11A Criminal Procedure Law
(CPL Sections 170 to 329)

Article 320—Waiver of Jury Trial and Conduct of Non-Jury Trial

Sec.

320.10 Non-jury trial; when authorized (pp. 602, 603).

320.20 Non-jury trial; nature and conduct thereof (pp. 605, 606).

Appendix A.

§ 320.10 Non-jury trial; when authorized

1. Except where the indictment charges a crime for which a sentence of death may be imposed upon conviction, the defendant, subject to the provisions of subdivision two, may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending.

2. Such waiver must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court. The court must approve the execution and submission of such waiver unless it determines that it is tendered as a stratagem to procure an otherwise impermissible procedural advantage or that the defendant is not fully aware of the consequences of the choice he is making. If the court disapproves the waiver, it must state upon the record its reasons for such disapproval.

3. An indictment "charges a crime for which a sentence of death may be imposed," within the meaning of subdivision one, when:

(a) It charges the defendant with murder as defined in subdivision one or three of section 125.25 of the penal law; and

(b) There is some possibility that either (i) the victim of the alleged crime was a peace officer who was killed in the course of performing his official duties, or (ii) the defendant was at the time of the commission of the alleged crime confined in a state prison or otherwise in custody under a sentence specified in subparagraph (ii) of paragraph (a) of subdivision one of section 125.30 of the penal law; and

(c) There is some possibility that the defendant was more than eighteen years old at the time of the commission of the alleged crime.

In determining whether there is some possibility of the existence of the factors specified in this subdivision so as to preclude a waiver of a jury trial, the court must, if the allegations of the indictment are not conclusive of the matter, examine the minutes of the grand jury proceeding underlying the indictment and conduct any further inquiry which may be necessary to acquire the information essential to such determination.
L. 1970, c. 996, § 1, eff. Sept. 1, 1971.[13]

Source of section: New.

§ 320.20 Non-jury trial; nature and conduct thereof

1. A non-jury trial of an indictment must be conducted by one judge of the superior court in which the indictment is pending.

2. The court in addition to determining all questions of law, is the execlusive[1] trier of all issues of fact and must render a verdict.

3. The order of the trial must be as follows:

(a) The court may in its discretion permit the parties to deliver opening addresses. If the court grants

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[13] This is the text of § 320.10 as it existed in 1972 when the defendant waived a jury trial and was tried and convicted in the State Court without a jury. Effective September 1, 1974 the Legislature substituted in subdivision 1 "the crime of murder in the first degree" for "a crime for which a sentence of death may be imposed upon conviction" and repealed subdivision 3. The present text of subdivision 1 which is found in the 1974 Pocket Part pp. 123-124, now reads:

§ 320.10 Non-jury trial; when authorized

1. Except where the indictment charges the crime of murder in the first degree, the defendant, subject to the provisions of subdivision two, may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending.

[*3. Repealed*]

As amended L.1974, c. 367, §§ 15, 16.

such permission to one party it must grant it to the other also. If both parties deliver opening addresses, the people's address must be delivered first.

(b) The order in which evidence must or may be offered by the respective parties is the same as that applicable to a jury trial of an indictment as prescribed in subdivisions five, six and seven of section 260.30.

(c) The court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first.

(d) The court must then consider the case and render a verdict.

4. The provisions governing motion practice and general procedure with respect to a jury trial are, wherever appropriate, applicable to a non-jury trial.

5. Before considering a multiple count indictment for the purpose of rendering a verdict thereon, and before the summations if there be any, the court must designate and state upon the record the counts upon which it will render a verdict and the particular defendant or defendants, if there be more than one, with respect to whom it will render a verdict upon any particular count. In determining what counts, offenses and defendants must be considered by it and covered by its verdict, and the form of the verdict in general, the court must be governed, so far as appropriate and practicable, by the provisions of article three hundred governing the court's submission of counts and offenses to a jury upon a jury trial.

L. 1970, c. 996, § 1, eff. Sept. 1, 1971.

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[1] So in original. Probably should be "exclusive."

Source of section: New.

§ 260.30 Jury trial; in what order to proceed (p. 484)

The order of a jury trial, in general, is as follows:

1. The jury must be selected and sworn.

2. The court must deliver preliminary instructions to the jury.

3. The people must deliver an opening address to the jury.

4. The defendant may deliver an opening address to the jury.

5. The people must offer evidence in support of the indictment.

6. The defendant may offer evidence in his defense.

7. The people may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the people's rebuttal evidence. The court may in its discretion permit the parties to offer further rebuttal or surrebuttal evidence in this pattern. In the interest of justice, the court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature but more properly a part of the offering party's original case.

8. At the conclusion of the evidence, the defendant may deliver a summation to the jury.

9. The people may then deliver a summation to the jury.

10. The court must then deliver a charge to the jury.

11. The jury must then retire to deliberate and, if possible, render a verdict.

L. 1970, c. 996, § 1, eff. Sept. 1, 1971.

Source of Section

See, Code Crim.Proc. 1881, § 388, amended L.1926, c. 417.

APPENDIX B

Transcript of Court Hearing at Which Defendant Waived Trial by Jury.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF RICHMOND

CRIMINAL TERM PART I

Ind. No. 1/1972
CHARGE: Robbery 3rd deg.

Ind. No. 311/1971
CHARGE: Att. rob. 1st deg.

FOR ALL PURPOSES

PEOPLE OF THE STATE OF NEW YORK,

against

CLIFFORD HERRING,

Defendant.

County Courthouse
Staten Island, N. Y. 10301

Friday, January 28, 1972
3:25 p.m.

BEFORE:

HONORABLE THEODORE G. BARLOW
Justice of the Supreme Court

APPEARANCES:

JOHN M. BRAISTED, JR., Esq., District Attorney
Appearing for the People
By: ARNOLD BERLINER, Esq., ADA, of Counsel

SEYMOURE ADAMS, Esq.
Appearing for the Defendant

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IRWIN GOLDSTEIN,
Official Court Reporter.

Appendix B.

The Clerk: Indictment 1/1972, and 311/1971, People against Clifford Herring, by Mr. Adams.

(Defendant stands before the bar with counsel.)

Mr. Adams: Judge, in this particular case, Judge, I spoke to Mr. Berliner here, and it seems that both cases will have to be tried. The defendant is willing to try the cases non-jury, Judge. And as long as there is no confession or admission made, as Mr. Berliner has told me, and nothing was seized, as I have been told, I will be ready to go next week, Judge. The reason I pushed on it, if I use the proper words, Judge, is because the defendant has been in jail several months now, Judge. And with the new rules now, and what you read, I think we should give the defendant a trial.

The Court: The new rules don't apply to anybody arrested prior to May 31, 1972. So the new rules have nothing to do with this. However, if the defendant wants to waive a jury trial, under the new statute he must do so in writing, in open court, in front of the Judge. Does he wish to waive a jury trial now?

Mr. Adams: Yes, Judge. (Confers with defendant.) Yes.

The Court: Now, Mr. Herring, it is my duty to inquire of you whether you fully appreciate what you are doing when you waive a jury trial. It is your right to waive the jury trial, but it is my duty to ask you if you fully appreciate what you are doing when you waive a trial by jury. Whether you know it or not, I will tell you, that under the constitution of the United States and the State of New York, you are entitled to a trial by jury. Now, if you waive that right which you have by statute, provided I am satisfied that you know what you are doing when you waive the trial, a jury trial, this is what will happen. There will be no jury sitting in this box. The

decision, not only on the law, but also on the facts will be made by the judge who sits here. Probably myself, but it doesn't matter. If you waive a jury, you waive a jury for all purposes, and whatever judge is sitting here will try you without a jury to decide on the facts of the case.

Now, this means that you are putting your faith on the facts as well as the law in the hands of the judge who sits here. Do you fully understand that?

The Defendant: Yes, I do.

The Court: And do you still wish to waive a trial by jury?

The Defendant: Pardon me?

The Court: Do you still wish to waive a trial by jury?

The Defendant: Yes.

The Court: Now, do you wish to waive a trial by jury as to both of these indictments, the first indictment—

Mr. Adams: The first one I believe is—

The Court: Well, 311/1971, which charges attempted robbery in the first degree, according to my calendar.

Mr. Adams: Yes.

The Court: And the second indictment is indictment number 1/1972, which charges the defendant with robbery in the third degree.

Mr. Adams: I make an application on behalf of the first one, Judge, at this time.

The Court: Mr. Adams, I am nct by-passing you, but it is my duty to interrogate the defendant personally on this.

Mr. Adams: I am sorry, Judge, I didnt' mean to interrupt.

(Mr. Adams confers with defendant.)

The Court: Mr. Herring, under this indictment, 311/1971, you are charged in three counts, the first count charges you with attempted robbery in the first degree: the second count charges you with attempted robbery in the third

degree; and the third count charges you with possession of weapons and dangerous instruments and appliances as a felony. Now, with full realization of the facts, do you still want to waive a jury trial and submit your fate to one man, the man who sits in this chair? Is that what you want to do, Mr. Herring?

The Defendant: Yes, your Honor.

The Court: All right. Have the statement signed.

(Defendant executes waiver.)

The Court: Mr. Herring, is this your signature (showing)?

The Defendant: Yes, it is, your Honor.

The Court: All right, we will mark this case ready and passed. We have one case scheduled for trial on Monday. As soon as that case is completed, we will try this case.

Mr. Adams: All right. Now, Judge, may I state this, Judge? I would appreciate, Judge, Monday and Tuesday I am sort of tied up, Judge. I would be ready on Wednesday, if the Court would be in a position at that time.

The Court: Well, if the case in front of this one is not ready on Monday, this case will start on Monday. What is going to prevent you from trying this case on Monday?

Mr. Adams: Two other commitments.

The Court: Are we talking about trials, or what?

Mr. Adams: Yes, Monday and Tuesday, non-jury cases which will take a very short time.

The Court: The name of the cases?

Mr. Adams: One is Manhattan civil court in New York, which I don't have the file number.

The Court: You are number one on Monday?

Mr. Adams: Yes.

The Court: All right, mark this ready and passed until Wednesday, the 2nd of February. The other case, number

1/1972, we will mark that ready and passed. Might as well select a date on that.

Mr. Adams: Judge, may we have that on for the same date?

The Court: All right, mark it the same date. Obviously we cannot try both the same date. February 2nd.

Mr. Adams: All right. I also have another request, Judge. The defendant informs me that he needs medical care and also needs some dental care.

The Court: Mr. Herring, you didn't get this?

Mr. Adams: No, and he says he is—I think he said he called this—you have called this to the attention of the Court before?

The Defendant: Yes, sir.

Mr. Adams: And he can't eat or swallow, Judge. Perhaps an order of the Court will assist.

The Court: I have already given one, but I will order now medical attention, dental attention, and a report from the department of correction as to when he receives it.

Mr. Adams: Judge, specifically, the medical is for his eyes. He needs glasses.

The Court: Indicate that. I am not sure that is within the realm of the Court, but indicate that on the order. As far as the dental care is concerned, I want a report from the department of correction as to when he receives this dental care. And indicate this is the second order that has been issued.

The Clerk: Remand.

(Defendant is remanded.)

• • •

(At 4:00 p.m. following proceedings take place in presence of defendant.)

The Court: Let the record show Mr. Herring's attorney has left the court, and this has reference only to the dental

treatment that the defendant may need or needs. Mr. Herring, I am told that you have received dental care. Is that correct, have you received dental care?

The Defendant: No, I haven't your Honor.

The Court: You received none?

The Defendant: No, I haven't.

The Court: I was told by the correction—

The Clerk: We were informed by correction that he has received care.

The Court: Do you have any personal knowledge of this?

Correction Officer Mendelsohn: No, your Honor.

The Court: What is exactly the dental care you need?

The Defendant: Your Honor, I have trouble eating, and the food is part of my health.

The Court: What exactly is missing? Is it false teeth?

The Defendant: Yes.

The Court: Did you have false teeth?

The Defendant: I had them, but they were broken and they were to be fixed by the government, and being I am incarcerated, I can't take care of business like that. Because I suffer from severe headaches when I didn't have them the last time.

The Court: Mr. Herring, I don't know what we can do about this under the circumstances. Can you tell me whether any dentist is available?

C. O. Mendelsohn: Yes, they have a dentist up there. As far as false teeth go, I don't think they go that far, unless the man is sentenced for a long time up State.

The Court: Do you have broken false teeth?

The Defendant: Yes.

The Court: Do you know if they have facilities?

C. O. Mendelsohn: Not in the Tombs, sir. I know they take care of the men's teeth in emergencies, any emergency

treatment they need, they pull his teeth, if he needs it. That they do. As to the extent of it, I couldn't say, sir.

The Court: Mr. Herring, I will see if I can figure something out for you. But I don't know what I can do about this. If they don't have the personnel and facilities, I can't require them to do what they can't do.

The Defendant: Your Honor, I understand that with the Court order they will send me out to the hospital, or even Rikers Island and they will take care of me there.

The Court: You think Rikers Island will take care of you?

The Defendant: Yes, glasses.

The Court: Do you have any information on this?

C. O. Mendelsohn: That I couldn't say, sir. But we will inquire.

The Court: I would appreciate that. The man can't eat without false teeth.

The Clerk: Remand.

(Defendant is remanded.)

* * *

Certified to be a true and correct transcript.

IRWIN GOLDSTEIN,
Official Court Reporter.

APPENDIX C

Defendant's Written Waiver of Jury Trial Signed in Open Court During Hearing.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF RICHMOND

CRIMINAL TERM

WAIVER OF JURY TRIAL

IND. NO. 311/1971

THE PEOPLE OF THE STATE OF NEW YORK

against

CLIFFORD HERRING

Defendant

Pursuant to Article 1, Section 2 of the Constitution I, Clifford Herring, the defendant, under Indictment No. 311/1971 do hereby waive a jury trial on this Indictment. I do so after consultation with my counsel, Seymour Adams and with full understanding of the rights which I waive hereby.

s/ CLIFFORD K. HERRING
Defendant

Witnessed by S. ADAMS
Attorney of Record

Appendix C.

Dated: 1/28/72

So Ordered:

s/ Theodore G. Barlow, J.S.C.
HON.
JUSTICE OF THE SUPREME COURT

State of New York }
County of Richmond } ss.:

I, Augustine B. Casey, Clerk of the County of Richmond, Do Hereby Certify, that I have compared the foregoing with the original waiver of jury trial on file in this office, and that the same is a correct transcript therefrom and of the whole of such original. Witness my hand and official seal this 7th day of February one thousand nine hundred and seventy-five.

Augustine B. Casey
Clerk

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HERRING *v.* NEW YORK

APPEAL FROM THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT

No. 73–6587. Argued February 26, 1975—Decided June 30, 1975

A total denial of the opportunity for final summation in a nonjury criminal trial as well as in a jury trial deprives the accused of the basic right to make his defense, and a New York statute granting every judge in a nonjury criminal trial the power to deny such summation before rendition of judgment violates the Sixth Amendment of the Constitution as applied against the States by the Fourteenth. Pp. 4–12.

43 App. Div. 2d 816, 351 N. Y. S. 2d 368, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 73-6587

Clifford Herring, Appellant, *v.* State of New York. | On Appeal from the Appellate Division of the Supreme Court of New York, Second Judicial Department.

[June 30, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

A New York law confers upon every judge in a nonjury criminal trial the power to deny counsel any opportunity to make a summation of the evidence before the rendition of judgment. N. Y. Crim. Proc. Laws § 320.20 (3)(c).[1] In the case before us we are called upon to assess the constitutional validity of that law.

I

The appellant was brought to trial in the Supreme Court of Richmond County, New York, upon charges of attempted robbery in the first and third degrees and possession of a dangerous instrument.[2] He waived a jury.

[1] Section 320.20 (3)(c) provides:

"The Court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first."

By contrast, New York law explicitly grants a right to make a "closing statement" in every civil case. N. Y. Civ. Prac. Rule 4016 (McKinney's 1963).

[2] New York Penal Law §§ 110.00/160.15; 110.00/160.05; 265.05.

The trial began on a Thursday, and, after certain preliminaries, the balance of that day and most of Friday were spent on the case for the prosecution. The complaining witness, Allen Braxton, testified that the appellant had approached him outside his home in a Staten Island housing project at about six o'clock on the evening of September 15, 1971, and asked for money. He said that when he refused this demand, the appellant had swung a knifeblade at him. On cross-examination, the appellant's lawyer attempted to impeach the credibility of this evidence by demonstrating inconsistencies between Braxton's testimony and other sworn statements that Braxton had previously made.[3] The only other witness for the prosecution was the police officer who had arrested the appellant upon the complaint of Braxton. The officer testified that Braxton had reported the alleged incident to him, and that the appellant, when confronted by the officer later in the evening, had denied Braxton's story and said that he had been working for a Mr. Taylor at the time of the alleged offense. The

[3] On cross-examination of Braxton, the appellant's lawyer demonstrated the following inconsistencies: First, Braxton testified at trial that, after running into his house to evade the appellant, he did not look back outside to see where the appellant had gone; but before the grand jury, Braxton had said that, after entering his house, he had looked outside and the appellant was gone. Second, Braxton testified at trial that the knife blade was shiny; but in his grand jury testimony he had said that he could not remember if it was shiny or not. Third, Braxton testified at trial that the appellant had asked him for money in a "soft" voice; but before the grand jury he had stated that the request for money was "kind of loud." Fourth, Braxton testified at trial that the appellant had swung a blade at him once; but in the felony complaint filed the day after the alleged crime, he had stated that the appellant had swung a knife at him "a couple of times."

officer testified that he had then arrested the appellant and found a small knife in his pocket.[4]

At the close of the case for the prosecution, the court granted a defense motion to dismiss the charge of possession of a dangerous instrument on the ground that the knife in evidence was too small to qualify as a dangerous instrument under state law. The trial was then adjourned for the two-day weekend.

Proceedings did not actually resume until the following Monday afternoon. The first witness for the defense was Donald Taylor, who was the appellant's employer. He testified that he recalled seeing the appellant on the job premises at about 5:30 p. m. on the day of the alleged offense. The appellant then took the stand and denied Braxton's story. He said that he had been working on a refrigerator at his place of employment during the time of the alleged offense, and further testified that Braxton, a former neighbor, had threatened on several occasions to "fix" him for refusing to give Braxton money for wine and drugs.

At the conclusion of the case for the defense, counsel made a motion to dismiss the robbery charges. This motion was denied. The appellant's lawyer then requested to "be heard somewhat on the facts." The trial

[4] There was a major inconsistency between the police officer's testimony and that of Braxton. Braxton testified that he was walking down the street with the officer at about 6:45 p. m. when they came across the appellant. But the officer testified that he had searched for the appellant with Braxton until only about 6:30 p. m., when they had separated, and that about an hour later he had seen the appellant and Braxton on opposite sides of Broadway. Thus Braxton testified that he and the officer were together when they found the appellant about 6:45 p. m., while the officer's testimony was that he had separated from Braxton about 6:30 p. m., and that he next saw Braxton and the appellant on opposite sides of a street at about 7:30 p. m.

judge replied: "Under the new statute, summation is discretionary, and I choose not to hear summations." The judge thereupon found the appellant guilty of attempted robbery in the third degree, and subsequently sentenced him to serve an indeterminate term of imprisonment with a maximum of four years. The conviction was affirmed without opinion by an intermediate appellate court.[5] Leave to appeal to the New York Court of Appeals was denied. An appeal was then brought here, and we noted probable jurisdiction. 419 U. S. 893.

II

The Sixth Amendment guarantees to the accused in all criminal prosecutions the rights to a "speedy and public trial," to an "impartial jury," to notice of the "nature and cause of the accusation," to be "confronted" with opposing witnesses, to "compulsory process" for defense witnesses, and to the "assistance of counsel."[6] These fundamental rights are extended to a defendant

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[5] The court subsequently certified that in affirming the judgment, it had rejected the appellant's constitutional claims:

"Upon the appeal herein, there was presented and passed upon the following constitutional question, namely, whether relator's rights under the Fourth, Sixth and Fourteenth Amendments were denied by the trial court's application of paragraph (c) of subdivision 3 of CPL 320.20 to refuse appellant permission to deliver a summation. This court considered appellant's said contention and determined that none of his constitutional rights were violated."

[6] The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

in a state criminal prosecution through the Fourteenth Amendment.[7]

The decisions of this Court have not given to these constitutional provisions a narrowly literalistic construction. More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments. For example, in *Ferguson* v. *Georgia*, 365 U. S. 570, the Court held constitutionally invalid a state statute that, while permitting the defendant to make an unsworn statement to the court and jury, prevented defense counsel from eliciting the defendant's testimony through direct examination. Similarly, in *Brooks* v. *Tennessee*, 406 U. S. 605, the Court found unconstitutional a state law that restricted the right of counsel to decide "whether, and when in the course of presenting his defense, the accused should take the stand." *Id.*, at 613. The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process.

There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to

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[7] See *Klopfer* v. *North Carolina*, 386 U. S. 213 (speedy trial); *In re Oliver*, 333 U. S. 257 (public trial); *Duncan* v. *Louisiana*, 391 U. S. 145 (jury trial); *Cole* v. *Arkansas*, 333 U. S. 196 (notice of nature and cause of accusation); *Pointer* v. *Texas*, 380 U. S. 400 (confrontation); *Washington* v. *Texas*, 388 U. S. 14 (compulsory process); *Gideon* v. *Wainwright*, 372 U. S. 335, and *Argersinger* v. *Hamlin*, 407 U. S. 25 (assistance of counsel).

make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.[8] The issue has been considered less often in the context of a so-called bench trial. But the overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense.[9]

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[8] See, *e. g.*, *Jackson* v. *State*, 239 Ala. 38, 193 So. 417 (1940); *Yeldell* v. *State*, 100 Ala. 26, 14 So. 570 (1894); *People* v. *Green*, 99 Cal. 564, 34 P. 231 (1893); *State* v. *Hoyt*, 47 Conn. 518 (1880); *Hall* v. *State*, 119 Fla. 38, 160 So. 511 (1935); *Williams* v. *State*, 60 Ga. 367 (1878); *Porter* v. *State*, 6 Ga. App. 770, 65 S. E. 814 (1909); *State* v. *Gilbert*, 65 Idaho 210, 142 P. 2d 584 (1943); *People* v. *McMullen*, 300 Ill. 383, 133 N. E. 328 (1921); *Lynch* v. *State*, 9 Ind. 541 (1857); *State* v. *Verry*, 36 Kan. 416, 13 P. 838 (1887); *Sizemore* v. *Commonwealth*, 240 Ky. 279, 42 S. W. 2d 328 (1931); *State* v. *Cancienne*, 50 La. Ann. 1324, 24 So. 321 (1898); *Wingo* v. *State*, 62 Miss. 311 (1884); *State* v. *Page*, 21 Mo. 257 (1855); *State* v. *Tighe*, 27 Mont. 327, 71 P. 3 (1902); *State* v. *Shehoudy*, 45 N. M. 516, 118 P. 2d 280 (1941); *People* v. *Marcelin*, 23 App. Div. 2d 368, 260 N. Y. S. 2d 560 (1965); *State* v. *Hardy*, 189 N. C. 799, 128 S. E. 152 (1925); *Weaver* v. *State*, 24 Ohio St. 584 (1874); *State* v. *Rogoway*, 45 Ore. 601, 78 P. 987, rehearing, 45 Ore. 611, 81 P. 234 (1904); *Stewart* v. *Commonwealth*, 117 Pa. 378, 11 A. 370 (1887); *State* v. *Ballenger*, 202 S. C. 155, 24 S. E. 2d 175 (1943); *Word* v. *Commonwealth*, 30 Va. (3 Leigh) 743 (1831); *State* v. *Mayo*, 42 Wash. 540, 85 P. 251 (1906); *Seattle* v. *Erickson*, 55 Wash. 675, 104 P. 1128 (1909).

One treatise states the general rule as follows: "The presentation of his defense by argument to the jury, by himself or his counsel, is a constitutional right of the defendant which may not be denied him, however clear the evidence may seem to the trial court." 5 Wharton, Criminal Law and Procedure § 2077 (1957).

[9] See *United States* v. *Walls*, 443 F. 2d 1220 (CA6 1971); *Thomas* v. *District of Columbia*, 67 App. D. C. 179, 90 F. 2d 424 (1937); *United States ex rel. Spears* v. *Johnson*, 327 F. Supp. 1021 (ED Pa. 1971), rev'd on other grounds, 463 F. 2d 1024 (CA3 1972); *United*

One of many cases so holding was *Yopps* v. *State*, 228 Md. 204, 178 A. 2d 879 (1962). The defendant in that case, indicted for burglary, was tried by the court without a jury. The defendant in his testimony admitted being in the vicinity of the offense, but denied any involvement in the crime. At the conclusion of the testimony, the trial judge announced a judgment of guilty. Defense counsel objected, stating that he wished to present argument on the facts. But the trial judge refused to hear any argument on the ground that only a question of credibility was involved, and that therefore counsel's argument would not change his mind. The Maryland Court of Appeals held that the trial court's refusal to permit defense counsel to make a final summation violated the defendant's right to the assistance of counsel under the state and federal constitutions:

> "The Constitutional right of a defendant to be heard through counsel necessarily includes the right to have his counsel make a proper argument on the

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States ex rel. Wilcox v. *Pennsylvania*, 273 F. Supp. 923 (ED Pa. 1967); *Floyd* v. *State*, 90 So 2d 105 (Fla. 1956); *Olds* v. *Commonwealth*, 10 Ky. (3 Ak. Marsh) 465 (1865); *Yopps* v. *State*, 228 Md. 204, 178 A. 2d 879 (1962); *People* v. *Thomas*, 390 Mich. 93, 210 N. W. 2d 776 (1973); *Decker* v. *State*, 113 Ohio St. 512, 150 N. E. 74 (1925); *Commonwealth* v. *McNair*, 208 Pa. Super. 369, 222 A. 2d 599 (1966); *Commonwealth* v. *Gambrell*, 450 Pa. 290, 301 A. 2d 596 (1973); *Anselin* v. *State*, 72 Tex. Crim. 17, 160 S. W. 713 (1913); *Walker* v. *State*, 133 Tex. Crim. 300, 110 S. W. 2d 578 (1937); *Ferguson* v. *State*, 133 Tex. Crim. 250, 110 S. W. 2d 61 (1937). Cf. *Collingsworth* v. *Mayo*, 173 F. 2d 695, 697 (CA5 1949); *State* v. *Hollingsworth*, 160 La. 26, 106 So. 662 (1925). But see *People* v. *Manske*, 399 Ill. 132, 77 N. E. 2d 164 (1948). Cf. *People* v. *Berger*, 288 Ill. 47, 119 N. E. 975; *Casterlow* v. *State*, 256 Ind. 214, 267 N. E. 2d 552 (1971); *Reed* v. *State*, 232 Ind. 68 (1953); *Lewis* v. *State*, 11 Ga. App. 14, 74 S. E. 442 (1912).

evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right." 228 Md., at 207.

The widespread recognition of the right of the defense to make a closing summary of the evidence to the trier of the facts, whether judge or jury, finds solid support in history. In the 16th and 17th centuries, when notions of compulsory process, confrontation, and counsel were in their infancy, the essence of the English criminal trial was argument between the defendant and counsel for the Crown. Whatever other procedural protections may have been lacking, there was no absence of debate on the factual and legal issues raised in a criminal case.[10] As the rights to compulsory process, to confrontation, and to counsel developed,[11] the adversary system's commitment to argument was neither discarded nor diluted. Rather, the reform in procedure had the effect of shifting the primary function of argument to summation of the evidence at the close of trial, in contrast to the "fragmented" factual argument that had been typical of the earlier common law.[12]

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[10] Stephen has described the trial procedure in this period as a "long argument between the prisoner and the counsel for the Crown." 1 Stephen, History of the Criminal Law of England, 326 (1883). For a fuller description of the trial process in that period, see *id.*, at 325–326, 350.

[11] See 7 Will. 3, c. 3, § 1 (1695); 1 Anne 2, c. 9, § 3 (1701); 6 & 7 Will. 4, c. 114, § 1 (1836).

[12] Cf. Stephen, *supra*, n. 10, at 349.

In the Colonies, where a similar reform in criminal defendants' rights occurred, common practice, if not right, apparently gave to

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt

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the accused the opportunity to sum up his case in closing argument. For example, Zephaniah Swift, in an early colonial treatise on the law in Connecticut, wrote:

"When the exhibition of evidence is closed, the attorney for the state opens the argument, the counsel for the prisoner follows, the attorney for the state then closes the argument, and the chief justice then sums up the evidence in his charge delivered to the jury, in which he states in the most candid and impartial manner, the evidence a id the law, and the arguments of the counsel for the state, as well as the prisoner. . . ."

2 Z. Swift, A System of the Laws of the State of Connecticut, at 401 (2 vol. 1795–1796). With a lesser degree of certainty, a modern scholar concludes that in the trial of capital offenses in Colonial Virginia, it was likely, but not certain, that the accused would be given an opportunity to make a closing argument in summation at the end of the trial. See H. F. Rankin, Criminal Trial Proceedings in the General Court of Colonial Virginia (1965), at 101.

In England, in 1865, the right of the defendant in a criminal trial to make closing argument, either by himself or by counsel if he was represented, was given express statutory recognition: "Upon every trial . . . whether the prisoners . . . or any of them shall be defended by counsel or not . . . such prisoner shall be entitled . . . when all the evidence is concluded to sum up the evidence respectively." Criminal Procedure Act of 1865, 28 & 29 Vict., c. 18, s. 2. This remains the rule in England. 10 Halsbury's Laws of England, § 777, pp. 422–423 (3d ed., London: 1955). See also Archibold, Criminal Pleading, Evidence and Practice § 558 (1969). Cf. *R.* v. *Wainright* (1875), 13 Cox 171; *R.* v. *Wickham and Others* (1971), 55 Cr. App. R. 199, Crim. L. R. 233, C. A.

of the defendant's guilt. See *In re Winship*, 397 U. S. 358.

The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion. See generally 5 Wharton, Criminal Law and Procedure, § 2077 (1957). Cf. A. B. A. Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function, §§ 5.8 (prosecution) and 7.8 (defense), at 126–129, 277–282 (1970).

But there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all. The only conceivable interest served by such a statute is expediency. Yet the difference in any case between total denial of final argument and a concise but persuasive summation could spell the difference, for the defendant, between liberty and unjust imprisonment.[13]

[13] We deal in this case only with final argument or summation at the conclusion of the evidence in a criminal trial. Nothing said in

Some cases may appear to the trial judge to be simple—open and shut—at the close of the evidence. And surely in many such cases a closing argument will, in the words of Mr. Justice Jackson, be "likely to leave [a] judge where it found him." [14] But just as surely, there will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel.[15]

The present case is illustrative. This three-day trial was interrupted by an interval of more than two days—a period during which the judge's memory may well have

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this opinion is to be understood as implying the existence of a constitutional right to oral argument at any other stage of the trial or appellate process.

[14] Jackson, Robert H., The Struggle for Judicial Supremacy, at 301 (New York, Alfred A. Knopf, 1941).

[15] The contention has been made that, while a right to make closing argument should be recognized in a jury trial, there is insufficient justification for such a right in the context of a bench trial. This view rests on the premise that a judge, with legal training and experience, will be likely to see the case clearly, rendering argument superfluous, or to recognize that further illumination of the issues would be helpful, in which case he would permit closing argument.

We find this contention unpersuasive. Judicial training and expertise, however it may enhance judgment, does not render memory or reasoning infallible. Moreover, in one important respect, closing argument may be even more important in a bench trial than in a trial by jury. As MR. JUSTICE POWELL has observed, the "collective judgment" of the jury "tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision." Powell, L., Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 4 (1966). In contrast, the judge who tries a case presumably will reach his verdict with deliberation and contemplation, but must reach it without the stimulation of opposing viewpoints inherent in the collegial decision-making process of a jury.

dimmed, however conscientious a note-taker he may have been. At the conclusion of the evidence on the trial's final day, the appellant's lawyer might usefully have pointed to the direct conflict in the trial testimony of the only two prosecution witnesses concerning how and when the appellant was found on the evening of the alleged offense.[16] He might also have stressed the many inconsistencies, elicited on cross-examination, between the trial testimony of the complaining witness and his earlier sworn statements.[17] He might reasonably have argued that the testimony of the appellant's employer was entitled to greater credibility than that of the complaining witness, who, according to the appellant, had threatened to "fix" him because of personal differences in the past. There is no way to know whether these or any other appropriate arguments in summation might have affected the ultimate judgment in this case. The credibility assessment was solely for the trier of fact. But before that determination was made, the appellant, through counsel, had a right to be heard in summation of the evidence from the point of view most favorable to him.[18]

In denying the appellant this right under the authority of its statute, New York denied him the assistance of counsel that the Constitution guarantees. Accordingly, the judgment before us is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[16] See n. 4, *supra*.

[17] See n. 3, *supra*.

[18] A defendant who has exercised the right to conduct his own defense has, of course, the same right to make a closing argument. See *Faretta* v. *California*, — U. S. —.

SUPREME COURT OF THE UNITED STATES

No. 73–6587

Clifford Herring, Appellant, *v.* State of New York.	On Appeal from the Appellate Division of the Supreme Court of New York, Second Judicial Department.

[June 30, 1975]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

I

The Court has made of this a very curious case. What began as a constitutional challenge to a statute which gives trial courts discretion as to whether "parties" may deliver summations, has been transformed into an exploration of the right to counsel—although no one doubts that appellant was competently represented throughout the proceedings which resulted in his conviction. Today's opinion, in deriving from the right to counsel further rights relating to the conduct of a trial, expands the earlier holdings in *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), and *Brooks* v. *Tennessee*, 406 U. S. 605 (1972). In each of these three instances one must presume, in view of the Court's analytical approach, that regardless of the intrinsic importance of the rights involved, they are enforced only because the accused has a prior right to the assistance of a third party in the preparation and presentation of his defense.

I think that in each instance a statement from Mr. Justice Frankfurter's separate opinion in *Ferguson* is apropos: "This is not a right-to-counsel case." 365 U. S., at 599. In the present case, the crucial fact is not that *counsel* wishes to present a summation of the evidence, but that the *defendant*—whether through counsel or

otherwise—wishes to make such a summation. Of course I do not suggest that the rights enforced in these cases are without basis, at least in particular cases, in the Due Process Clause of the Fourteenth Amendment. Cf. *Ferguson* v. *Georgia*, 365 U. S., at 598–601 (separate opinion of Mr. Justice Frankfurter); *Brooks* v. *Tennessee*, 406 U. S., at 618 (dissenting opinion). But I do suggest that the Court's analytical framework, and its resulting prophylactic rule, are wrongly employed to decide this case.

I would have thought that in *Faretta* v. *California*, No. 73–5772 (June 30, 1975), the Court had recanted its approach in *Ferguson* and *Brooks* v. *Tennessee*. In *Faretta* the Court concluded that it is the Sixth Amendment, and not the right-to-counsel clause of that Amendment, which "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." Slip op., at 13. Yet in the present case we are informed that it is the right-to-counsel clause which constitutionalizes the right to present a defense "in accord with the traditions of the adversary factfinding process." *Ante*, at 5. Not being content merely to contradict *Faretta* by holding that entitlement to the traditions of our judicial system depends upon the right to retain counsel, the Court also states that, "of course, the same right to make a closing argument" is available to those who choose not to exercise their right to counsel. *Ante*, n. 18. To complete the confusion, the Court does not explain the latter *ipse dixit*, but does cite one case—*Faretta*.

II

The Due Process Clause of the Fourteenth Amendment has long been recognized as assuring "fundamental fairness" in state criminal proceedings. See, *e. g.*, *Lisenba* v. *California*, 314 U. S. 219, 236 (1941); *Moore* v. *Dempsey*, 261 U. S. 86, 90–91 (1923). Throughout the history of

the clause we have generally considered the question of fairness on a case-by-case basis, reflecting the fact that the elements of fairness vary with the circumstances of particular proceedings. As the Court observed in *Snyder* v. *Massachusetts*, 291 U. S. 97, 116–117 (1934):

> "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."

See, *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *Spencer* v. *Texas*, 385 U. S. 554 (1967); *Chambers* v. *Mississippi*, 410 U. S. 284 (1973); *Cupp* v. *Naughten*, 414 U. S. 141 (1973).

However in some instances the Court has engaged in a process of "specific incorporation," whereby certain provisions of the Bill of Rights have been applied against the States. See the cases cited *ante*, n. 7. In making the decision whether or not a particular provision relating to the conduct of a trial should be incorporated, we have been guided by whether the right in question may be deemed essential to fundamental fairness—an analytical approach which is compelled if we are to remain true to the basic orientation of the Due Process Clause. See, *e. g.*, *In re Oliver*, 333 U. S. 257, 270–271 (1948) (public trial); *Duncan* v. *Louisiana*, 391 U. S. 145, 155–158 (1968) (jury trial); *Pointer* v. *Texas*, 380 U. S. 400, 403–404 (1965) (confrontation); *Washington* v. *Texas*, 388 U. S. 14, 17–19 (1967) (compulsory process); *Gideon* v. *Wainwright*, 372 U. S. 335, 342 (1963) (appointed counsel). But once we have determined that a particular right should be incorporated against the States, we have abandoned case-by-case considerations of fairness. Incorporation, in effect, results in the establishment of a strict prophylactic rule, one which is to be generally observed in every case regardless of its par-

ticular circumstances. It is a judgment on the part of this Court that the probability of unfairness in the absence of a particular right is so great that denigration of the right will not be countenanced under any circumstances. These judgments by this Court reflect similar judgments made by the Constitution's Framers with regard to the Federal Government.

Beyond certain of the specified rights in the Bill of Rights, however, I do not understand the basis for abandoning the case-by-case approch to fundamental fairness. There are a myriad of rules and practices governing the conduct of criminal proceedings which may or may not in particular circumstances be necessary to assure fundamental fairness. Obvious examples are the rules governing the introduction and testing of evidence, as well as, I think, the New York rule governing summations in nonjury trials. Such matters are not specifically dealt with in the text of the Constitution, nor are they subject to the judgment that uniform application of a particular rule is necessary because the likelihood of unfairness is too great when that rule is not observed. As to such matters it is appropriate, and frequently necessary, that trial judges be accorded considerable discretion, subject of course to both appellate review on an abuse-of-discretion standard and, ultimately, to the fundamental fairness inquiry under the Fourteenth Amendment.

The present case is a prime example of why a prophylactic rule with regard to summations in nonjury trials is thoroughly inappropriate. The case was tried before a judge who, unlike a jury, may take notes on testimony, and who is experienced in both judging the credibility of witnesses and testing the relevance of their testimony to the elements which must be proved to obtain a conviction. The case was conceptually and factually a

simple one, involving no more than whether one was to believe the victim, despite the inconsistencies in his testimony, or the defendant.[1] The judge had previously permitted appellant's counsel to summarize the evidence, on the occasion of the motion to dismiss at the close of the State's case. That appellant's counsel had considerable faith in the judge's familiarity with, and ability to organize, the evidence is shown by the transcript of that earlier summation:

> "MR. ADAMS. Do you want to hear me extensively on that, Judge? Or I have a witness here, I can go on, or would you rather hear me on some lengthy argument subsequently, Judge?
>
> "THE COURT. I will hear anything you have to say.
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> "MR. ADAMS. All right. Judge, I believe here that as a matter of law we have a doubt here. Firstly, on this first witness of the prosecution here, Judge. There were numerous inconsistencies, and *I will not bore the Court reading that. Of course the Court has notes on it, and I am sure it is very fresh in the Court's mind.* But on top of that, Judge, we have a questionable complainant, with a questionable way of how it happened, no witness other than this complainant.
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> "An officer who checked out this particular matter testified here and said that the man was working at that time. A definite denial by the defendant. And I believe that as a matter of law, Judge, there is a reasonable doubt here." App., at 66 (emphasis added).

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[1] The employer's credibility was not at issue. Not only was he vague as to the times at which he had seen appellant at his garage, but that garage was located only 3½ blocks from the scene of the crime. App., at 76, 86.

Similarly, when the opportunity to summarize was denied, appellant's counsel did not so much as suggest that he thought it necessary to refresh the judge's memory as to certain matters.[2] It should also be noted that in his earlier argument counsel had referred to most of the matters which the Court today suggests might have usefully been brought to the judge's attention in a final summation. See *ante*, at 12. Finally, the fact that the judge conducted this trial in a fair-minded fashion, and would not arbitrarily prevent a summation which could be expected to clarify his understanding of the case, is evidenced by his dismissal of one count over the vigorous protests of the prosecution.

Whatever theoretical effect the denial of argument may have had on the judgment of conviction, its practical effect on the outcome must have been close to nothing. The trial judge was not conducting a moot court; he was sitting as the finder of fact in a trial in which he had been present during the testimony of every single witness. No experienced advocate would insist on presenting argument to such a judge after he had indicated his belief that argument would not be of assistance.

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[2] The colloquy at the end of the trial was as follows:

"MR. ADAMS. Judge, at this time I respectfully move to—make two motions, Judge. Firstly, that the Court dismiss the two counts, first count and the second count of the indictment on the grounds the People have failed to make out a prima facie case; and on the further grounds the People have failed to prove the defendant guilty of each and every part and parcel of the crimes charged in count one and count two beyond a reasonable doubt as a matter of law, and as a matter of fact.

"THE COURT. Motion denied. I will take a short recess to deliberate, and I will give you a verdict.

"MR. ADAMS. Well, can I be heard somewhat on the facts?

"THE COURT. Under the new statute, summation is discretionary, and I choose not to hear summations.

"THE CLERK. Remand." App., at 92.

Trial counsel here did not insist, and the claim which is today sustained by this Court is urged by other counsel.

The truth of the matter is that appellant received a fair trial, and I do not read the Court's opinion to claim otherwise. The opinion instead establishes a right to summation in criminal trials regardless of circumstances, by tagging that right onto one of the specifically incorporated rights. It thereby conveniently avoids the difficulties of being unable to characterize appellant's trial as fundamentally unfair, but only at the expense of ignoring the logical difficulty of adorning the specifically incorporated rights with characteristics which are not themselves necessary for fundamental fairness.[3]

The nature of the right which the Court today creates is as curious as its genesis. Apparently it requires nothing more than *pro forma* observance, since the trial judge "must be and is given great latitude" in controlling the duration and limiting the scope of closing summations. He may determine what is a "reasonable" time for argument, and at what point the argument becomes repetitive or redundant, or strays "unduly" from the mark. "In all these respects he must have broad discretion." *Ante*, at 10. That is, after 30 seconds, or some other minimal period of argument, the judge is free to exercise his discretion. It is not clear why this should be so. If it is true that

[3] While the Court, *ante*, at 9–10, presents a variety of arguments supporting the wisdom and desirability of generally permitting closing arguments in nonjury trials, none of them impress me as rising to the level of fundamental fairness. They would be of substantial merit if presented to the New York Legislature, but are hardly relevant to the constitutional inquiry which it is our duty to perform. As for the Court's final flourish ("no aspect of such advocacy could be more important"), it is obvious hyperbole which can only be uttered in complete disregard of such matters as cross-examination, the selection of trial strategy and witnesses, and attempts to exclude unconstitutionally obtained evidence.

"there is no certain way for a trial judge to identify accurately [those cases in which closing argument may be beneficial], until the judge has heard the closing summation of counsel," *ante*, at 11, it is equally true that he cannot determine whether continued argument will be repetitive, redundant or otherwise useless until he has heard the continued argument. But in any event, the constitutional issue does rather quickly become framed once again according to the standards which should have governed all along—whether or not the judge's actions in the particular case deprived the defendant of a trial which was fundamentally fair.[4]

By propagating a right to summation—despite such a right's lack of textual basis, and despite the inability reasonably to conclude that the right is so basic that we cannot chance trial court discretion in the matter—the Court has furthered the practice of reviewing state criminal trials in a piecemeal fashion. The incident upon which this reversal is based was but one stage in a carefully conducted trial, and cannot be claimed to have permeated the entire proceeding as would trial without a jury, or without counsel. The Court is thus disregarding the basic question of whether the proceeding by which a defendant is deprived of his liberty is fundamentally fair.

The Court's decision derives no support either from logic or from the amendment it professes to apply. Since it reverses a criminal conviction which was fairly obtained, I dissent.

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[4] I would also think it not unlikely under the Court's holding that post-trial briefing would be an adequate substitute for oral summation, since it meets the concerns which the Court expresses as the basis for its newly found constitutional right. See *ante*, at 9–10.